TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted]

No. [redacted]

WELLS FARGO & COMPANY, PETITIONER,

vs.

OSCAR G. TAYLOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED [redacted]

CERTIORARI AND RETURN FILED [redacted]

(26,509)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 448.

WELLS FARGO & COMPANY, PETITIONER,

vs.

OSCAR G. TAYLOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Wednesday, November 21st, A. D. 1917, at New Orleans, Louisiana, before the Honorable Richard W. Walker and the Honorable Robert L. Batts, Circuit Judges, and the Honorable Beverly D. Evans, District Judge:

OSCAR G. TAYLOR, Appellant,

versus

WELLS FARGO & COMPANY, Appellee.

Be it remembered, that heretofore, to-wit, on the 20th day of June, A. D. 1917, a transcript of the record of the above
b styled cause, pursuant to an appeal from the District Court of the United States for the Northern District of Mississippi, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3102 as follows:

c TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3102.

OSCAR G. TAYLOR, Appellant,

versus

WELLS FARGO & COMPANY, Appellee.

Appeal from the District Court of the United States for the Northern District of Mississippi.

(Original Record Filed June 20, 1917.)

U. S. Circuit Court of Appeals. Filed July 19, 1917. Frank H. Mortimer, Clerk.

1 In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

Be it remembered, That at a term of the District Court of the United States for the Eastern Division of the Northern District of

Mississippi, begun and held at the City of Aberdeen, in said Division and District, on the First Monday of October, A. D. 1916, to which term of the Court the within styled and numbered cause was previously continued; and on the 5th day of said Term, being the 6th day of October, A. D. 1916, among other proceedings had at said Term, were the following, to-wit:

Present, The Honorable H. C. Niles, Judge of said Court, and the other officers of said Court as on the first day of the Term aforesaid.

No. 158, In Equity.

WELLS FARGO & COMPANY.

versus

OSCAR G. TAYLOR.

"This being a regular day of the October Term, 1916, of this Court, this cause came on for hearing; It is ordered and decreed that the cause be and is submitted to be heard during vacation on brief." (Minute Book 11, page 55.)

Thereupon said action was heard on briefs, and proceeded with to a final disposition as of the October Term, 1916, of said Court, and during the progress thereof pleadings and papers were filed and orders and decrees made and entered as of the days and dates hereinafter stated, to-wit:

2 *Assignment of Errors.*

In the United States District Court for the Eastern Division of the Northern District of Mississippi.

O. G. TAYLOR, Appellant,

vs.

WELLS FARGO & Co., Appellee.

Comes now the said Appellant, O. G. Taylor, and having asked for an allowance of an appeal from the decree herein against him sustaining the amended bill of the Appellee and allowing Appellee a perpetual injunction against Appellant restraining him from collecting a judgment he had obtained in the State Courts of Miss., and assigns as errors in said decree, and the proceedings of the court therein as follows:

1st. The Court erred on the reversal and remand of this cause from the United States Circuit Court of Appeals from the 5th Circuit in sustaining the motion of the Appellee and permitting it to amend the bill.

2nd. The Court erred on the reversal and remand of this cause from the United States Circuit Court of Appeals for the 5th Circuit

in overruling the motion of the appellant to dismiss the bill and dissolve the injunction.

3rd. The Court erred in overruling the objection of the appellant to the introduction by the appellee of the Messengers application and the Messengers agreement and release marked Exhibit "B," to Original Bill.

4th. The Court erred in overruling the Appellant's motion to dismiss the bill and dissolve the injunction, which motion was made at the close of Appellee's case and which motion was also made again at the close of Respondent's case both of which motions were overruled; because

3 A. The bill as amended was without equity.

B. Because the contract or Messenger's Agreement and release, Exhibit "B" upon which the appellee's case is based and under which it seeks relief is contrary to public policy because by it the St. L. & S. F. R. R. Co., a common carrier by railroad would relieve itself from liability of the gross negligence of its agents and employees on account of which gross negligence the appellant while lawfully on said train of said railroad company as an employee of said company was injured.

C. Because the contract or messengers agreement and release, Exhibit "B" is contrary to public policy for the reason that by means of the messengers agreement or release the appellee, a common carrier by railroad, is seeking to relieve itself from liability of the gross negligence of its agents and employees or partner or co-proprietor, to-wit, the St. L. & S. F. R. R. Co., in the course of its business, on account of which gross negligence the appellant, while lawfully on said train and while engaged in handling interstate commerce, was injured.

D. Because the evidence discloses the fact that Appellant was injured while handling interstate commerce as an employee of a common carrier by railroad on account of the negligence of the employees or agents or co-proprietor of said common carrier by railroad, and the messengers agreement or release, Exhibit "B," the basis of appellee's suit, is void and unenforc-able as violative of the provisions of an Act of Congress of April 22nd, 1908, Chapter 149, 35 Statutes at Large, page "65" Sections 1 and 5 thereof and amendments thereto.

E. Because it is contrary to public policy and the comity of Courts for the U. S. District Court to grant the prayer of the prayer of the bill for injunction restraining the appellant from issuing execution to collect a judgment obtained without fraud in the State Courts of Miss., against the St. L. & S. F. R. R. Co., a court of

4 concurrent jurisdiction with the U. S. District Court; as it would be an interference with the jurisdiction of the said State Courts first had and obtained in the above styled cause.

F. Because by taking a jurisdiction and granting the appellee the injunctive relief restraining Appellant from issuing an execution to collect a judgment obtained by him in the case in the State Courts of Miss., against the St. L. & S. F. R. R. Co., the District Courts of the United States would be acting contrary to and in violation of

Section 720 of the Revised Statutes of the United States of America and in violation of Sec. 265. Chapter 11 of Judiciary Act of March 3, 1911.

G. Because it appears from the record and the evidence in the case that the appellee voluntarily sought the jurisdiction of the State Courts of Miss., in the case of O. G. Taylor, the appellant, vs. the St. L. & S. F. R. R. Co., requesting that it be made a party defendant with the said Railroad Co., and that upon being denied this by said State Court, the Appellee did not exhaust its remedy given it in the State Courts of Miss., by appeal to the Supreme Court of Miss., on this Adverse ruling but abandoned the same and filed the present suit in the U. S. District Court.

H. Because it appears from the evidence in the case and the record that the messengers agreement or release, Exhibit "B," and the contract between appellee and the St. L. & S. F. R. R. Co., Exhibit "A" to the original bill in this cause, were offered in evidence by said railroad company in the case of O. G. Taylor, appellant, vs. the St. L. & S. F. R. R. Co., in the State Courts of Miss., and the messengers agreement or lease, Exhibit "B," was held void and unenforce-able by the Circuit Court of Monroe County, Miss., and on appeal by the Supreme Court of Miss., and no appeal was prosecuted to the Supreme Court of the U. S. by the said Railroad company from said judgment and rulings and therefore the said judgment and ruling by the State Courts of Miss., and the construction placed by the State Courts on the messengers agreement or release Exhibit "B," stand unreversed and the U. S. District Court was bound by the construction and ruling and judgment of the State Courts and there could be no legal fraud committed by appellant in obtaining this judgment.

5th. The Court erred in rendering the final decree in this cause granting a perpetual injunction against the appellant and restraining him from issuing an execution to collect the judgment obtained by appellant against the S. L. & S. F. R. R. Co., in the State Courts of Miss., and in decreeing specific performance of the messengers agreement or release.

6th. The Court erred in not decreeing the dissolution of the injunction heretofore granted appellee and erred in not dismissing the bill in this cause and taxing appellee with the costs.

Wherefore and by reason of said errors as appears from the record in this cause, appellant says there is error in the record for which the cause should be reversed and said Court directed to dismiss the bill and dissolve the injunction and the appellee and its bondsmen be taxed with all the costs of this proceeding.

PAINE & PAINE.
Counsel for Appellant.

Indorsed: Assignment of Errors. Filed April 26th, 1917.

6 In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

In Equity. No. 158.

WELLS FARGO & CO.

vs.

OSCAR G. TAYLOR.

This day this cause came on to be heard, it being a regular day of the October Court, 1916, and it appearing to the Court that the defendant, Oscar G. Taylor, has prayed for an appeal in open court and filed his assignment of errors and has also tendered into court his appeal bond for costs in the amount of $500.00; and it further appearing to the Court, that this is the same term of the Court in which the above styled cause came on for trial and that the cause was taken under advisement for decision in vacation as of this term of court, and that it is the same term of court in which the decree was entered for Complainant and against the Defendant;

It is therefore the judgment of the Court and so ordered and decreed that the petition of appeal for the defendant to the United States Circuit Court of Appeals for the 5th Circuit be allowed and the bond as tendered into Court be approved.

This the 27th day of April, 1917.

H. C. NILES,
District Judge.

Indorsed: Decree Allowing Appeal. Filed April 28, 1917.

In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

In Equity. No. 158.

WELLS FARGO & CO.

vs.

OSCAR G. TAYLOR.

The above named defendant, conceiving himself aggrieved by the decree made and entered on the 26th day of April, 1917, in
7 the above styled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Fifth Circuit, for the reason specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, procedure and papers upon which

said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit.

PAINE & PAINE,
Attorneys for Defendant.

The foregoing claim of appeal is allowed, this the 27th day of April, 1917.

H. C. NILES,
District Judge.

Indorsed: Petition for Appeal. Filed April 28th, 1917.

In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

In Equity. No. 158.

WELLS FARGO & CO.

vs.

O. G. TAYLOR.

Know all men by these presents, that we, O. G. Taylor, as principal, and George C. Paine and W. E. Ware, sureties are held and firmly bound unto Wells Fargo & Co., in the full and just sum of $500.00, to be paid Wells Fargo & Co., their attorneys, executors or administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. Sealed with our seals and dated, this the 29th day of March, 1917.

Whereas, lately at a District Court for the Eastern Division of the Northern District of Mississippi, in a suit pending in said
8 Court between Wells Fargo & Co., Complainant, and O. G. Taylor, defendant, a decree was rendered against the said defendant, O. G. Taylor, and the said Taylor having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the Wells Fargo & Co., citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be holden at the City of New Orleans, La., on the 3rd Monday of November, 1917, next.

Now the condition of this bond is such that if the said O. G. Taylor shall prosecute his appeal to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, otherwise to remain in full force and effect and virtue.

Signed and delivered in the presence of Geo. H. Edwards and Henry Dugan, this the 29th day of March, 1917.

(Signed) O. G. TAYLOR,
By PAINE & PAINE, *Atty's.*
GEORGE C. PAINE.
W. E. WARE.

Approved by
H. C. NILES,
U. S. District Judge.

Indorsed: Appeal Bond. Filed April 28, 1917.

9 *Original Bill.*

In the Circuit Court of the United States in and for the Eastern Division of the Northern District of Mississippi, October Term, 1910.

In Equity.

WELLS FARGO & CO., Complainant,

vs.

OSGAR G. TAYLOR, Defendant.

To the Honorable, the Judges of the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi:

Wells Fargo & Company, a corporation, chartered under and by virtue of the laws of the State of Colorado and a citizen of the said State of Colorado, having its principal place of business in said State, and being a foreign corporation in the State of Mississippi, brings this bill against Oscar G. Taylor, a resident citizen of the City of Aberdeen, County of Monroe, State of Mississippi, in the Eastern Division of the Northern District of Mississippi.

And your Orator says, that among other things, it is authorized by its charter to do an Express business within the United States of America, and in furtherance of this business to make contracts with the Railroad Companies and other common carriers for the carrying of its express, and furthermore to make contracts with parties to accompany said shipments of express in the cars of the said Railroad Companies or in the vehicles of other common carriers to care for and protect the said express packages as express messengers, or guards.

Your Orator further states and shows unto the Court that on the 10th day of February, 1906, it made a contract with the St. Louis and San Francisco Railroad Company, a corporation chartered and existing under and by virtue of the laws of the State of Missouri, for the handling of the express of your Orator on the trains of the

Saint Louis and San Francisco Railroad Company. That under and by virtue of this contract, your orator handled the express on the passenger trains of the above named railroad company be-
10 tween Aberdeen, Monroe County, Mississippi, and Amory, Monroe County, Mississippi; your orator having an express messenger or guard to accompany said express between the two above named points. That, under and by virtue of this contract with the said Railroad Company, your orator assumed all risks and damages to its agents and employees while engaged in its business on any of the railways or on the property of the above named Railroad Company, and thereby agreed to indemnify and hold harmless the Saint Louis and San Francisco Railroad Company on account of all claims for damages suffered by the agents and employees of the Express Company while engaged in its business on any of the Railways, or property of the above named Railway Company. That this contract with the Saint Louis & San Francisco Railroad Company, was in force and effect during the month of December, 1909. (A copy of which contract is hereto attached, marked Exhibit "A," and asked to be taken and considered as a part of this bill).

Your orator would further state and show unto the Court that on April 20th, 1909, the Defendant, Oscar G. Taylor, and your orator entered into a written agreement duly signed and executed by the said Oscar G. Taylor, under and by virtue of which agreement, Oscar G. Taylor became an employee of your orator whose duty it was as said employee to accompany said express matters of your orator on the passenger trains of the Saint Louis & San Francisco Railroad Company between Aberdeen and Amory, towns in Monroe County, Mississippi. * * * (Here Amendment). These said passenger trains being known as the Aberdeen Branch trains. That this agreement signed and executed by the said Oscar G. Taylor provided, among other things, that since the common carriers, or Railroads would not allow the said employees of your orator to ride on its trains, except upon the agreement that your orator would hold the said Railroad Company or common carrier harmless from any and all liability for injuries which such employees of your orator might receive while accompanying said goods, or traveling on their lines as such employees, and whereas the defendant, Oscar
11 G. Taylor, with full knowledge of all the foregoing facts was desirous of entering into the employment of your orator as one of such messengers or guards, and whereas, your orator declined to employ the said Oscar G. Taylor, except upon the condition that he would agree that neither your orator, nor the said Railroad Company should under any circumstances, or in any case whatever, be liable for any injuries occurring to said Oscar G. Taylor while so traveling, whether such injuries should arise from any fault, carelessness, or negligence, gross, or otherwise on the part of the said Railroad Company, its Agents or Servants; it being the intention of this contract that Oscar G. Taylor should assume all and every risk, incident to said employment from whatever cause arising. The said agreement further provides that it shall extend to and inure to the benefit of the said Railroad Company. (A copy of this agree-

ment is hereto attached marked Exhibit "B," and is asked to be taken as a part of this bill).

That on the 8th day of December, 1909, while Oscar G. Taylor was acting as an employee of your orator under and by virtue of his contract made with your orator, above set out, and was riding on a train of cars of the said Saint Louis & San Francisco Railroad Company in charge of the express of your orator, this train of cars became wrecked ,and the express car, in which the defendant was traveling was thrown to the ground and Oscar G. Taylor sustained personal injuries to his body.

Your orator further states and shows unto the Court that on or about the 10th day of February, 1910, the defendant, Oscar G. Taylor, brought a suit against the Saint Louis and San Francisco Railroad Company in the Circuit Court of the County of Monroe, State of Mississippi, which suit is still pending, for the sum of Twenty Thousand ($20,000.00) Dollars on account of the personal injuries sustained by him in the wreck of the train of the Saint Louis & San Francisco Railroad Company as above set out. * * * (Here Amendment).

Your orator would further state and show unto the Court that it was not made a party defendant to this suit in the Circuit
12 Court of Monroe County, Mississippi, though it is the real party in interest in said suit. That on the 14th day of March, 1910, your orator filed in the Circuit Court of Monroe County, Mississippi, a petition setting out its contract with Oscar G. Taylor, and its contract with the Saint Louis & San Francisco Railroad Company and prayed the said Circuit Court to make it a party defendant to the above suit of Oscar G. Taylor against the Saint Louis & San Francisco Railroad Company, because it is the real party in interest and desired to be made a party to the suit in order that it might remove it to the Circuit Court of the United States for this District of Mississippi. That the said Saint Louis & San Francisco Railroad Company filed a motion in the said Circuit Court of Monroe County, asking that the plaintiff in said suit be required to make your orator a party defendant to the suit, but the said petition of your orator was denied, and the said motion of the Sait. Louis & San Francisco Railroad Company overruled, and your orator was therefore deprived of the right to remove the said suit into the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi.

Your orator would further state and show unto the Court that if the said Oscar G. Taylor should recover a judgment against the Saint Louis & San Francisco Railroad Company in his suit now pending against it in the Circuit Court of Monroe County, that under and by virtue of your orator's contract above set out with the Saint Louis & San Francisco Railroad Company, your orator would have to pay the amount of the said judgment recovered by Taylor and further indemnify the Railroad Company for any expense incurred by it on account of this law suit.

Your orator would further state and show unto the Court that the defendant, Oscar G. Taylor, is a man of no means, and so far as your

orator can ascertain has no property upon which an execution could be issued in case your orator should be compelled to sue the said Oscar G. Taylor on its contract with him above set out, and
13 should recover a judgment against the said Taylor for the amount your orator would be compelled to pay to the Saint Louis & San Francisco Railroad Company, on account of the said suit in Monroe County, Mississippi of the said Oscar G. Taylor against the said Railroad Company. In other words, while your orator would have to indemnify the Railroad Company, by virtue of its contract with it, your orator could not compel Taylor to indemnify it because Taylor has not sufficient property upon which execution might be levied.

Your orator would further state and show unto the Court that irreparable wrong and injury and financial loss would be sustained by it if the said defendant Oscar G. Taylor is permitted to proceed with his suit in the Circuit Court of Monroe County, Mississippi, against the Saint Louis & San Francisco Railroad Company.

Your orator would further state and show unto the Court that he has no adequate relief in a court of law.

Premises considered, your orator would pray that this Court issue a temporary injunction or restraining order directed to the said Oscar G. Taylor of the City of Aberdeen, Monroe County, Mississippi, restraining him from proceeding with his suit in the Circuit Court of Monroe County, Mississippi, against the Saint Louis & San Francisco Railroad Company until this bill has been heard upon its merits; Second, that a writ of subpœna issue from this Honorable Court, directed to the said defendant, commanding him to appear at a certain day and under a certain penalty, therein to be expressed, before this Honorable Court to answer this Bill—(Answer under oath is hereby expressly waived)—and to do and receive what to your Honors may be meet and proper in the premises; and that on final hearing your Honors will enter a decree that the defendant, Oscar G. Taylor, do specifically perform and carry out the said agreement entered into between him and your orator, and that he be perpetually enjoined from proceeding with his law suit against the Saint Louis & San Francisco Railroad Company; that he be required to execute and deliver to the Saint Louis & San Francisco Railroad Company a good and sufficient release of all claims
14 and causes of action, arising out of the injuries sustained by him above described in this Bill; and for such other, further, different, and general relief as your Honors may deem meet and proper in the premises, and as in duty bound, it will ever pray.

E. O. SYKES, JR., AND
J. A. SYKES,
Solicitors for Complainant.

STATE OF MISSOURI,
City of Saint Louis:

I, C. F. Belcher, of lawful age and being first duly sworn, upon my oath, depose and say that I am an Agent and Assistant Superin-

tendent of the above named complainant, Wells Fargo & Company, and as such, make, and am authorized to make this affidavit; that I have read the above and foregoing bill and am acquainted with the facts therein stated and that they are true as I verily believe.

C. F. BELCHER.

Sworn to and subscribed before me this the 29th day of April, A. D. 1910.

[NOTARIAL SEAL.] JAMES J. DILLON.

My commission expires on the 13th day of Feb'y, A. D. 1914.

EXHIBIT "A."

This agreement made and entered into this 10th day of February, 1906, by and between the St. Louis & San Francisco Railroad Company, a corporation duly authorized and existing under and by virtue of the laws of the State of Missouri, for itself and for all lines now or hereafter owned, operated, leased, or controlled by it, or with which it has trackage arrangements, for convenience hereinafter called the "Railroad Company" party of the first part, and Wells Fargo & Company, a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, for convenience hereinafter called the "Express Company," a party of the second part;

Witnesseth:

First. That in consideration of the payments, covenants and agreements hereinafter set forth, to be by the Express Company duly made, kept and performed, and subject to the provisions and conditions herein contained, the Railroad Company hereby agrees to transport or cause to be transported by cars attached to regular passenger trains, over all lines aforesaid, to and from all stations at which said trains make regular stops, the messengers, safes, packing trunks, and express matter of said Express Company on all of said passenger trains each way daily, and so often as said trains may run; provided, however, that the persons hereby agreed to be transported shall be only such as accompany the express matter and valuables of the Express Company, and such other persons as it may become necessary to send over the aforesaid railways, upon the business of said Express Company, and that for such persons passes shall be granted by the Railroad Company on the written application of a duly authorized officer of the Express Company.

Second. That for the convenience of the aforesaid messengers safes, packing trunks and express matter, the Railroad Company agrees to provide cars or car space, and to light and warm the same when necessary and furnish the same with other customary conveniences, on all said passenger trains running upon the herein mentioned lines.

Third. That the Railroad Company further agrees that it will,

so far as it can conveniently do so, permit the Express Company to use a portion of its station houses on the lines herein described, or hereafter acquired, as provided in the preamble and article twelve without charge therefor, for the reception, safe keeping and delivery of express matter carried under this agreement; and it further
16 agrees that none of its employees, for themselves, or for said Railroad Company, be allowed to transport on said passenger trains, money, valuable packages, goods, or merchandise of any kind whatsoever, except passenger's baggage, or goods or material for the use of the Railroad Company.

Fourth. The express business to be carried on under this contract is understood to mean all such business as is commonly carried by express companies at the present time, or as may be carried by them during the continuance of this contract, and the Railroad Company agrees that it will not carry or transact any express business on its own account, nor permit any of its agents or employees to carry or transact such business; nor will it grant to any person or persons, corporation or association, any express transportation or facilities whatsoever upon all or any part of the said Railroad Company's lines, either for through or local traffic, during the continuance of this contract, and any such express business offered to the Railroad Company shall be turned over to the Express Company to be carried by and for the benefit of the Express Company.

Fifth. That the Railroad Company further agrees to transport, free of charge, over the lines covered by this contract, the wagons, horses, provender, safes and other materials to be used by said Express Company in the transaction of its business at the various points on the lines embraced in this agreement; and it also agrees that the express company shall have the right to employ the agents and servants of the Railroad Company as its own agents, when such employment will not, in the opinion of the Railroad Company, be to the interruption or detriment of its business; provided, however, that in no case shall the Railroad Company be in anywise responsible for any loss, cost or damage caused by the negligence or malfeasance of such servant or agent when so acting as agent for the Express Company.

17 Sixth. The Railroad Company agrees that it will also transport, free of charge, and with due dispatch, over any telegraph lines now or hereafter owned, operated, or controlled by it, or by any of the Railroad Companies whose lines are covered by this contract, the messages of the Express Company, or its officers or agents, relating to its said Express business on said lines, and will also give its good will and influence in securing to the Express Company any other telegraph facilities which may by the Express Company be hereafter desired. Provided, that the Express Company hereby agrees to assume and does assume, all risks of damage by reason of inaccuracy or delay in transmission, delay in delivering or failure to deliver any message, transmitted under this contract; and provided, further, that this article shall not be held or construed to require the Railroad Company to afford the Express Company any telegraphic facilities which it cannot perform under its existing con-

tract and legal obligations, or under any contracts which it may hereafter make.

Seventh. In consideration of the covenants and agreements of the Railroad Company hereinabove set forth to be by it duly kept and performed, the Express Company agrees that it will pay to the Railroad Company amounts equal to fifty-five per cent (55%) of the gross earning derived from the express business transacted on the lines herein mentioned, and in computing such earnings on all matter destined to or shipped from points beyond any termini of the lines of the Railroad Company herein described, the same shall be accounted for on a pro rata per mile carried of the entire through rate charged thereon; and the Express Company having this day entered into agreements similar in form in many respects to this agreement, with each of the following named railroad companies, to-wit: Chicago and Eastern Illinois Railroad Company, the Evansville and Terre Haute Railroad Company, the St. Louis, San Francisco and Texas Railway Company, the Fort Worth and Rio Grande Railway Company, and the Paris and Great Northern Railroad Company, covering the express business on the respective lines of
18 the above named companies, the Express Company hereby covenants that said fifty-five per cent. (55%) of such gross earnings, derived from the express business transacted on the lines covered by this contract, when taken together with the several sums of money paid and agreed to be paid to said Chicago and Eastern Illinois Railroad Company, Evansville and Terre Haute Railroad Company, St. Louis, San Francisco and Texas Railroad Company, Ft. Worth and Rio Grande Railway Company, and Paris and Great Northern Railroad Company under and by virtue of said several contracts herein named, as consideration for the services to be rendered and the facilities to be furnished by said respective companies under said contracts, shall in no case be less than One Hundred and Seventy ($170.00) Dollars per mile per annum for the aggregate mileage of all said lines, including the mileage covered by this agreement, provided, that the mileage in the Northern Division (Kansas City District) between Kansas City and Fort Scott, and the mileage in the Ash Grove District between Fort Scott and Springfield, shall be excluded from consideration in computing the minimum guaranteed by the above covenant; and, provided, further, that the above named minimum shall not apply to or include the mileage designated in the attached schedule, as mileage to which the eighty-five ($85) dollar per mile minimum applies, or to any other mileage covered by the trackage, or other mileage arrangements by which the Express Company, though permitted to do through business, is excluded from transact*ed* local business over the same, or to any other mileage over which express facilities are furnished exclusively on mixed trains, but all such mileage as is included in this proviso, or so designated in said schedule shall be computed at a minimum of one half the regular mileage minimum, or eighty-five ($85) dollars per mile per annum.

Eighth. The Express Company hereby stipulates and agrees that it will well and truly pay or cause to be paid to the Railroad Com-

pany for the services by it rendered, and facilities furnished in pursuance of this agreement, as follows: One twelfth of the
19 mileage minimum so guaranteed shall be paid not later than the fifteenth day of each month for the preceding month to Treasurer of said Railroad Company; provided, however, (*a*) That so soon as a statement of the business transacted during the preceeding month can be made after the close of the month a copy of such statement shall be transmitted to the Railroad Company and it shall have the right to examine in detail, through its designated officer, the accounts of the Express Company relating to its business under this agreement, for the purpose of determining the correctness of the statement rendered, and if it shall appear by the monthly statements so rendered that fifty five (55%) per cent. of the gross earnings derived from the express business transacted on the lines operated as set forth in section seventh hereof, is in excess of the sum hereby guaranteed as a minimum payment per mile, in any one year, then further payment of such excess shall be made to the Treasurer of the Railroad Company, within ninety days after the close of such year.

(*b*) At the end of each year and immediately after the amount of gross earnings for such year shall have been ascertained, as provided in paragraph (*a*) of this Article, an accounting shall be had of the amounts paid and agreed to be paid to the Chicago and Eastern Illinois Railroad Company, the Evansville and Terre Haute Railroad Company, the St. Louis, San Francisco and Texas Railway Company, the Ft. Scott and Rio Grande Railway Company, and the Paris and Great Northern Railway Company, as well as of the amounts paid and agreed to be paid to the Railroad Company as fifty five (55%) per cent of the gross earnings derived from the express business transacted on the lines operated under this agreement, and if the amount so paid and agreed to be paid to the Railroad Company when taken together with all the sums paid and agreed to be paid to said Chicago and Eastern Illinois Railroad Company, Evansville and Terre Haute Railroad Company, St. Louis, San Francisco and Texas Railway Company, Fort Worth and Rio Grande
20 Railway Company, and Paris and Great Northern Railroad Company, under the contracts with said last named companies hereinbefore referred to, shall amount to a sum less than the amount hereby guaranteed as a minimum payment per mile in any one year, then further payment of such deficit shall be made to the Treasurer of the Railroad Company within four months after the close of such year.

Ninth. The Express Company hereby further agrees that it will not without the consent of the Railroad Company charge less than one and one half current railroad tariff freight rates on any matter between intermediate points exclusive to the lines covered by this contract. And the Express Company hereby further agrees that it will not charge, without the consent of the Railroad Company, less than one and one-half current railroad tariff freight rates on any matter from or to any points whatever upon said lines except where

it may be necessary to do so to meet the competition of other express companies.

Tenth. That the Express Company further agrees that it will and it does hereby assume all risks, losses and damage to its own property, express matter and valuable packages, carried under the provisions of this contract; and also that it will and it does hereby assume all risk and damage to its agents and employes while engaged in its business on any of the railways or property of the Railroad Company, and hereby agrees to indemnify and hold harmless the St. Louis & San Francisco Railroad Company on account for all claims for damages suffered by the agents and employes of the Express Company while engaged in its business on any of the railways or property of the Railroad Company, and further agrees to indemnify and hold harmless the Railroad Company for any loss or damage suffered by it or for which it may be held liable on account of any wrongful or negligent acts of the agents of the Express Company while engaged in its business on any of the railways or property of the Railroad Company.

21 Eleventh. That the express company further agrees to carry, without charge, as a part of the consideration of this contract, over any and all of the lines of the railway above mentioned, all money and other valuable packages belonging to the Railroad Company, or pertaining to its business, and to deliver the same as addresed at all proper places of delivery on said lines or at the termini thereof; provided, however, that the Railroad Company shall assume all risks of loss or injury of or to such money and other valuable packages, unless the same shall be caused by fault or dishonesty of the employees of the Express Company; and the Express Company will also carry packages not exceeding twenty (20) pounds in weight each, over other lines operated by it, providing such lines do not object; it being understood that its liability in such case is subject to the same limitations as set forth in this contract.

Twelfth. For all purposes of this agreement, the St. Louis & San Francisco Railroad Company is to be regarded as embracing not only the main line of the road of the company, but also all branches and leased lines now in its possession, and all lines of road that may hereafter be acquired by lease, or by construction, or by purchase, and all lines of road that the Railroad Company does now, or may hereofter control, by any form or agreement or arrangement, in such manner as to enable the Railroad Company to empower the Express Company to transact an express business on and over the same, and in case, at any time during the perios [period] of this contract, the Railroad Company shall abandon and shall cease to furnish to the Express Company any express facilities over any portion of the lines of railroad hereby covered, then and in that case such portion of such lines of the Railroad Company shall be excluded from this contract and shall not thereafter be considered in determining the minimum amount of compensation to be received by the Railroad Company.

A statement of the present mileage operated under the contract

with the Chicago and Eastern Illinois Railroad Company,
22 with the Evansville and Terre Haute Railroad Company, with the St. Louis, San Francisco and Texas Railway Company, with the Fort Worth and Rio Grande Railway Company, and with the Paris and Great Northern Railroad Company, respectively, as well as the present mileage operated under this contract, is hereto attached and initialed for identification.

For the purpose of determining the proper or correct mileage under this contract from time to time, the Comptroller or General Auditor of the Railroad Company will duly advise either the President or the General Auditor of the Express Company in detail of any additions thereto or deductions therefrom; Provided, that when the Comptroller or General Auditor of the Railroad Company shall so advise the President or General Auditor of the Express Company of any additions to the present mileage of either the Railroad Company or any of the other companies herein named, the question of whether the minimum guaranty of one hundred and seventy ($170) dollars a mile shall apply to additional mileage, or whether the minimum guaranty of eighty-five ($85) dollars a mile shall apply thereto, or whether such additional mileage shall be entirely excluded from consideration in computing the minimum guaranty under this agreement, shall be taken up between the two companies and adjusted with fairness and candor, and a memorandum of such supplemental mileage with the adjustment as to the application of the minimum, shall be attached to this contract and made a part hereof.

Thirteenth. This agreement shall take effect on the first day of July, 1906, and shall continue and remain in force until July 1st, 1909, and thereafter until either of the parties hereto shall give to the other six months notice in writing of its desire to terminate the same, and during the continuance thereof shall be binding upon the parties hereto, their and each of their successors and assigns.

In witness whereof, the parties hereto have caused this agreement to be executed in duplicate by their respective officers thereto
23 duly authorized, the day and year first above written.

Approved as to form.
(Sgd.) L. F. PARKER,
General Solictor.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
(Sgd.) By A. J. DAVIDSON,
[SEAL.] *President.*

Attest:
(Sgd.) F. H. HAMILTON,
Secretary.

WELLS FARGO & COMPANY,,
(Sgd.) By DUDLEY EVANS,
[SEAL.] *President.*

Attest:
(Sgd.) H. B. PARSONS,
Secretary.

EXHIBIT "B."

Wells Fargo & Company Express.

Messenger's Agreement.

STATE OF MISSISSIPPI.

Aberdeen Office, April 20th, 1909.

This agreement, made the day, year and place above set forth, between Wells Fargo & Company, a corporation, party of the first part, and Oscar Greenberry Taylor, of Aberdeen, State of Mississippi, party of the second part, witnesseth:

Whereas, the said party of the first part is an express company, neither owning, controlling, managing, or in any way directing any railroad, steamboat or stage line, or other method of transportation, or any cars, boats, stages or means of transportation, but relying wholly upon railroads, steamboats, stages and other methods
24 of transportation, entirely owned, controlled, managed, and directed by other corporations, or by individuals, for the forwarding and transportation of goods and other freight intrusted to it to be forwarded and transported; and whereas, goods and other freight forwarded and transported by it over railroad lines are required to be and are carried in express or baggage cars; and whereas, in order to the proper and convenient dispatch of its business, it is usually necessary for the party of the first part to have guards to guard money shipments, and to have messengers accompany goods and other freight forwarded and transported by it, and ride in the cars in which said goods or freight may be; and whereas, the proprietors or owners of said railroad, and other lines over which it does business, will not allow the employees of the party of the first part to accompany such goods or other freight, and ride in the cars, boats, stages or other vehicles in which the same may be, except upon the agreement that said party of the first part will hold them harmless from any and all liability for injury which such employees of the party of the first part may receive while accompanying said goods or other freight, or traveling on their lines, as such employees; and whereas, the party of the second part, with full knowledge of all the foregoing facts, is desirous of entering the employment of the party of the first part, as one of such messengers or guards, as aforesaid; and whereas, the party of the first part declines to employ the party of the second part except upon the condition that this agreement shall be duly executed and delivered by the party of the second part.

Now, in consideration that the party of the first part receives the party of the second part into such employment, and of the salary to be paid therefor, and of the premises, it is agreed: that neither the party of the first part, nor any railroad or steamboat company, or other carrier, on whose lines said party of the second part may

travel, as such messenger or guard, shall, under any circumstances, or in any case whatever, be liable for any injury occurring to said party of the second part, while so traveling, whether such injury arises from any fault, carelessness or negligence, gross or otherwise, on the part of said railroad or steamboat company, or other carrier, its or their agents or servants; it being the intent of this contract that said party of the second part shall and will assume all and every risk incident to said employment, from whatever cause arising.

In consideration of the premises, and the sum of one dollar to him in hand paid, the receipt whereof is hereby acknowledged, the party of the second part further agrees that this agreement shall extend to and inure to the benefit of any railroad or steamboat company, or other carrier, upon whose line the party of the second part may receive injury in the course of and during said employment. In the event of any future employment of the party of the second part, by the party of the first part, this agreement shall be binding on the parties hereto, and shall apply to such future employment.

Witness the hand and seal of the party of the second part at the date aforesaid.

(Signed) O. G. TAYLOR. [SEAL.]
OSCAR GREENBERRY TAYLOR. [SEAL.]

Witness:
L. B. PETTIGREW.

Indorsed:—Bill for Specific Performance, etc. Filed May 2nd, 1910.

Supplemental Bill.

In the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi, October Term, 1910.

No. 158.

WELLS FARGO & COMPANY

vs.

OSCAR G. TAYLOR.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi:

Wells Fargo & Company, a corporation, chartered under and by virtue of the laws of the State of Colorado and a resident citizen of the said state of Colorado, having its principal place of business in said State and being a foreign corporation of the State of Mississippi, presents the following supplemental bill against Oscar G. Taylor, who is a citizen and a resident of the City of Aberdeen, County of

Monroe, State of Mississippi and of the Eastern Division of the Northern District of Mississippi; and thereupon your orator complains and says:

That heretofore, and on or about the 2nd day of May, A. D. 1910, your orator duly filed his original bill of complaint in this Honorable Court against the Defendant, in which your orator prays for certain relief, the particulars of which are set forth in said original bill, filed in the office of the Clerk of this Court on the said 2nd day of May, A. D. 1910—reference to which is hereby made the same as if the same were set forth herein in full—. And your orator further shows unto your Honors that said above named defendant was duly served with process or subpœna in said suit, and has duly appeared and filed a demurrer in due course.

27 Your orator would respectfully represent and show unto the Court that since the filing of the original bill in this cause by your orator, and the filing of the demurrer by the defendant and the over-ruling of the application of your orator for a temporary restraining order, or injunction against the said defendant, restraining him from proceeding with this suit in the State Circuit Court of Monroe County, Mississippi against the Saint Louis and San Francisco Railroad Company, fully set forth in the original bill, the State Circuit Court has held its June Term in said County, when the following proceedings were had in the said State Court in the above mentioned suit of Oscar G. Taylor against the said Saint Louis and San Francisco Railroad Company, viz:

Before the said cause was set for trial upon its merits, the defendant, the Saint Louis and San Francisco Railroad Company, filed a motion for a continuance, setting out the fact of the filing of the bill in this Honorable Court by Wells Fargo & Company against the said Taylor, and also setting out the fact that in the Equity suit, pending in this Honorable Court, the questions involved in the State Court would be finally and completely adjudicated along with the other questions involved in the said cause in this Honorable Court, and alleging further that it was unnecessary and would be a useless expenditure of time and trouble for the State Court to try the cause and that it would result in harm to Wells Fargo & Company, the real party in interest, and to the Defendant Railroad Company also for the State Court to proceed to the trial of the cause. And further setting forth the gist of the allegations alleged in the original bill filed in this Honorable Court.

That upon a hearing of the said motion for a continuance, the Circuit Court overruled the same and set the case peremptorily for trial. That said cause was tried in the said State Court on or about July 12th, A. D. 1910, and that in the course of the said trial the defendant offered in introduction as evidence the Messenger's Agreement purported to be signed by said Oscar G. Taylor,—a copy

28 of which said agreement is attached to the original bill as an exhibit,—and that before the offer or introduction of said Messenger's Agreement above referred to the said defendant Railroad Company, proved by a witness, one L. B. Pettigrew, that the said Oscar G. Taylor had duly signed the said agreement. After

the introduction of said testimony and upon motion of the attorneys for the Plaintiff, the said Circuit Court excluded the testimony of the said L. B. Pettigrew and declined to allow the said defendant to introduce in testimony the said Messenger's Agreement. The said Circuit Court held that the said Messenger's Agreement or contract was not a legal defense for the said defendant Railroad Company because it is in the nature of a contract against negligence. Whereupon the case was submitted to the jury upon a peremptory charge of the Circuit Court to return a verdict for the Plaintiff and assess his damages as shown by the testimony.

The jury then returned a verdict for the plaintiff for the amount of Four Thousand Dollars ($4,000.00), whereupon the Circuit Court entered judgment for the plaintiff for this amount.

The defendant filed in Court a motion for a new trial, which was over ruled by the Court.

The defendant Railroad Company has since filed its application for an appeal together with a supersedeas bond for the amount of Eight Thousand Dollars ($8,000.00) and the cause is now appealed to the Supreme Court, but the transcript of the same has not as yet, to the knowledge of your orator been filed with the Supreme Court Clerk.

Your orator would further state and show unto your honors that the costs of the Circuit Court trial, including the witness fees, etc., amounted to about One Hundred and Twenty-Four Dollars and Twenty-five Cents, as shown by the Cost Bill of the State Circuit Clerk.

Your orator would further state and show unto the Court that the defendant Railroad Company made its appeal bond for Eight Thousand Dollars with the guaranty company, which will cost an amount of money not known to your orator.

29 That your orator, as the real party in interest, in said suit, pending in the State Court, will have to pay all judgments and all costs rendered against the defendant, the Saint Louis and San Francisco Railroad Company in accordance with its said contract with the Railroad Company made an exhibit to the Original Bill, and that your orator cannot approximate what the total amount of said judgment and costs will be in case the said Supreme Court affirms the judgment of the State Circuit Court.

* * * Your orator would further state and show unto the Court that on the 9th day of July, A. D., 1912, the Supreme Court of the State of Mississippi affirmed the judgment for Four Thousand Dollars ($4,000.00) rendered by the Circuit Court of Monroe County, in favor of the said Oscar G. Taylor against the said St. Louis & San Francisco Railroad Company.

Your orator would further state and show unto the Court that the defendant, Oscar G. Taylor, is insolvent, and that irreparable wrong and injury would result to your orator if the said Taylor be allowed to collect the judgment against the defendant Railroad Company, should the same be affirmed in the State Supreme Court.

Your orator would further show unto the Court that it believes that the prosecution of the said law suit against the said Railroad

Company by the said Taylor in the State Circuit Court is in violation of the said Taylor's contract with your orator and is a legal fraud upon the rights of your orator.

To the end therefore that the defendant may, if he can, show why your orator should not have the relief hereby prayed and may, according to the best and utmost of his knowledge and belief, full, true, and direct answer make to the allegations in the bill; but not under oath, answer under oath being expressly waived, your orator prays for the relief herein, before prayed in the original bill of complaint filed herein on the 2nd day of May, A. D. 1910, reference to which is hereby made, the same as set forth herein in full, and the prayer for relief in which is hereby reiterated herein in full; and for such other, further, different, and general relief, as your Honors may deem meet and proper in the premises; and that at the October Term of said Court, your Honors will issue a temporary restraining order or injunction, or some other proper order, directed to the said Oscar G. Taylor, enjoining him from attempting to collect any judgment he may obtain against the said Railroad Company; or in some other way duly protecting the rights of your orator until a final hearing of this cause upon its merits, and as in duty bound, your orator will ever pray.

SYKES & SYKES,
Sooicitors [Solicitors] for Complainant.

STATE OF MISS.,
Monroe County:

I, E. O. Sykes, Jr., after being duly sworn upon my oath depose and say that I am one of the solicitors for complainant, Wells Fargo & Company, and as such make, and am authorized to make this affidavit, that I have read the foregoing supplemental bill and am acquainted with the facts therein stated and that they are true as I verily believe.

E. O. SYKES, JR.

Sworn to and subscribed before me this the 3rd day of September, A. D. 1910.

L. E. OLDHAM, *Clerk*,
[SEAL.] By R. D. CRENSHAW, *D. C.*

Indorsed: Supplemental Bill. Filed September 3rd, 1910.

31 *Petition for Temporary Injunction.*

In the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi, October Term, 1910.

No. 158.

WELLS FARGO & COMPANY

vs.

OSCAR G. TAYLOR.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi:

Your petitioner, Wells Fargo & Company, prays this Honorable Court that it issue a temporary injunction, enjoining and restraining the defendant, Oscar G. Taylor, from in any way attempting to collect any judgment obtained, or which may be obtained by him in the State Circuit Court, or the Supreme Court of Mississippi in the suit of Oscar G. Taylor vs. the Saint Louis & San Francisco Railroad Company.

Petitioner alleges that unless it is granted a temporary injunction said Taylor may collect a judgment in the above case, which would result in irreparable loss and damage to your petitioner.

SYKES & SYKES,
Att'ys Comp.

Indorsed: Petition for Temporary Injunction. Filed September 27, 1910.

32 In the United States District Court for the Eastern Division of the Northern District of Mississippi.

No. 158. In Equity.

WELLS FARGO & COMPANY

vs.

OSCAR G. TAYLOR.

The complainant in this cause, Wells Fargo & Company, filed, in proper form, its application for a temporary injunction to enjoin the defendant, Oscar G. Taylor, from collecting a judgment in his favor and against Complainant, entered in the Circuit Court of Monroe County, Mississippi.

The granting of the temporary injunction is resisted by the defendant on the ground that under Section 5 of the Employers' Li

bility Act of 1908, the contract between the Defendant and Complainant, forming the basis of this litigation, is void; and that the constitutionality of the said Act is fully sustained in the case of Mondau against Railroad Company.

Complainant, in answer to this contention, takes the position that because the said contract wes entered into before the enactment of the said Employers' Liability Act of 1908, it (the contract) cannot be affected thereby, and that this act could only apply to contracts made after its enactment; otherwise it would be unconstitutional, as impairing the obligation of a contract, and therefore retroactive.

That if said contract was lawful when entered into, it cannot be rendered unlawful by subsequent legislation.

That as defendant's suit was not based upon said Act, but upon the common law, said act is not applicable to this case.

That the Act only applies to common carriers by railways.

The application concludes with the statement that irreparable injury will be done complainant unless the temporary injunction is granted.

33 It is not conceived the duty of the Court, upon the application for a temporary injunction, to decide the contentions of counsel as to the applicability of the Employers Liability Act of 1908 to this controversy; its constitutionality and bearing upon the contract of the parties.

Complainant represents to the Court that the defendant, Taylor, is hopelessly insolvent, and if permitted to collect his judgment in the State Court, Complainant, if successful in this suit, would be utterly unable to reap the fruits of his victory, and so would suffer irreparable injury. The Court is bound to accept this statement as true until denied.

Should the temporary injunction be granted, what is then the situation of this defendant? His right to recover remains the same, and under the protection of an ample injunction bond, he can suffer no real damage.

It is considered the duty of the Court to grant the injunction as prayed, even though complainant's right to permanent relief be doubtful, as its effect in this instance would only maintain a status quo pending adjudication, and is a question resting upon the inconvenience to be caused the parties. The defendant retains his proper remedy, and, if successful, the complainant is solvent and able to respond. The complainant, if denied the injunction, and the defendant permitted to collect the judgment, must rely solely on defendant's personal responsibility. It appears that the defendant is hopelessly insolvent.

Let a temporary injunction issue as prayed upon the Complainant entering into a good and sufficient bond in the sum of $1,000.00.

H. C. NILES,
Judge.

Indorsed: Order granting Temporary Injunction. Filed July 15, 1912.

34 In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

The President of the United States, to Oscar G. Taylor, and his agents, attorneys, and all persons for him concerned, and to the Marshal of the Northern District of Mississippi, Greeting:

In our District Court of the United States for the Eastern Division of the Northern District of Mississippi at Aberdeen, Wells Fargo & Company has filed its bill for relief and for a temporary injunction restraining you from attempting to collect any judgment you may have obtained against the St. Louis & San Francisco Railroad Company in the Circuit Court of Monroe County, Mississippi, and has obtained the same, returnable before said Court, sitting as a Court of Equity, at Aberdeen, on Monday, the 7th day of October, A. D. 1912;

Therefore, we command, and strictly enjoin upon you, the said Oscar G. Taylor, your agents, attorneys, and all other persons for you concerned, to desist from attempting to collect any judgment you may have obtained against the St. Louis & San Francisco Railroad Company in the Circuit Court of Monroe County, Mississippi, until the order or decree of our said District Court be made to the contrary.

This obey at your peril. And we commond you, the said Marshal, to deliver to said defendant a copy of this writ, and have the same before our said Court at the time and place aforesaid.

Witness, The Honorable H. C. Niles, Judge of said Court, and the seal thereof at Aberdeen, in said Division and District, this the 19th day of July, A. D. 1912.

L. E. OLDHAM, *Clerk*,
By R. D. CRENSHAW, *D. C.*

[SEAL.]

35 *Marshal's Return.*

Received this Writ at Aberdeen, July 25th, 1912, and on the same day at Aberdeen, I executed the same on the within named Oscar G. Taylor, defendant, by delivering to him in person a true copy of the same.

This the 25th day of July, A. D. 1912.

A. M. STORER,
U. S. Marshal,
By L. B. PHILLIPS,
Deputy.

Indorsed: Temporary Injunction. Returned and filed July 27, 1912.

Answer of O. G. Taylor, the Above Named Defendant to the Original and Supplemental Bills Exhibited Against Him by Above Complainants.

In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

No. 158.

WELLS FARGO & CO., Complainants,

vs.

OSCAR G. TAYLOR, Defendant.

The defendant now and at all times hereafter saving and reserving to himself all and all manner of benefits and advantages of exceptions which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said bill and supplemental bills of complaint contained, for answer thereto after the over-ruling of his demurrer to said bills and supplemental bills or unto so much or such parts thereof as this defendant is advised that it is material or necessary for him to make answer unto, by consent of court, answering says:

36 1st. He denies that he signed and entered into a written agreement as alleged in the bill in this cause and as alleged in the supplemental bill.

2nd. Denies that at the trial of the suit of O. G. Taylor vs. St. Louis & San Francisco Railroad Co., in the Circuit Court of Monroe County, Miss., the Complainant proved by L. B. Pettigrew a witness, that the said O. G. Taylor had duly signed the contract Exhibit "B" to the Bill and supplemental bill in this cause. Avers the fact to be that said Pettigrew only testified to the fact that Taylor did sign the exhibit "B" before mentioned; and states that at said trial O. G. Taylor testified that he had not signed said contract.

3rd. Submits the fact to be that the contract, Exhibit "A" to the original bill in this cause made between the complainant and the St. Louis & San Francisco Railroad Co., and the Messenger's Agreement, Exhibit "A," alleged to have been made by Complainant and Defendant, and upon which contract and alleged agreement Complainant seeks the relief prayed for in its original and supplemental bills are violative of the Act of Congress of the United States, 35th Statutes 65, Chapter 149, known as the Employers Liability Act and non-enforce-able in the Courts of the United States of America.

4th. Avers the fact to be that at the time of the accident to defendant, Taylor, on March 8th, 1909, and for which he recovered judgment in the Circuit Court of Monroe County, Miss., against the St. Louis & San Francisco Railroad Co., and which judgment was affirmed by the Supreme Court of the State of Miss., the St. Louis & San Francisco Railroad Co., and the Complainant were common

carriers by railroad and engaged in commerce between the State of — the United States of America; and that the defendant, O. G. Taylor, at the time of the injury was engaged in handling interstate shipments for Complainant and the St. Louis & San Francisco Railroad Co.

37 5th. Avers that the injury, for which defendant recovered judgment in the Courts of the State of Miss., was caused by the negligence of complainant's agents or employees, to wit, the St. Louis & San Francisco Railroad Co.

6th. Denies that the prosecution of the suit against the St. Louis & San Francisco Railroad Co., was in violation of the alleged contract with complainant and was a legal fraud upon the legal rights of complainant. But states the fact to be that the contract Exhibit "A" and the messenger's agreement, Exhibit "B," which complainant seeks to enforce in this Court is contrary to and in violation of an Act of Congress of United States of America as passed and enacted by Congress on April 22nd, 1908, 35th Statutes-at-Large, 65, Chapter 149; and is unenforce-able in the Courts of the United States of America.

And now having fully answered Defendant prays to be hence dismissed with his costs in this behalf most wrongfully sustained.

PAINE & PAINE,
Attorneys for Respondent.

STATE OF MISS.,
Monroe County:

O. G. Taylor, being duly sworn, deposeth and says that he is well acquainted with the answer in this cause; that he has read the same and knows the contents thereof; that the same is true to the knowledge of deponent, except as to matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

Witness my signature this the 28th day of June, 1913.

O. G. TAYLOR.

Sworn to and subscribed before me this the 28th day of June, 1913.

R. D. CRENSHAW,
[SEAL.] *U. S. Com'r N. Dist. of Miss.*

Indorsed: Answer of Defendant to O. & S. Bills. Filed June 28, 1913.

38 In the District Court of the United States for the Eastern Division of the Northern District of the State of Mississippi.

WELLS FARGO & CO.

vs.

OSCAR G. TAYLOR.

Comes now the said Respondent after the Mandate of the Circuit Court of Appeals in this cause has been filed, and moves the Court in conformity with said Mandate and the opinion therein to dissolve the injunction and dismiss the bill and tax complainant with all the costs.

PAINE & PAINE,
Atty's for Respd.

May 24th, 1915.

Indorsed: Motion of Respondent to dissolve injunction, dismiss bill and tax complainant with costs. Filed May 24th, 1915.

Motion to Amend Bill.

In the District Court of the United States in and for the Eastern Division of the Northern District of Mississippi.

WELLS FARGO & CO., Complainant,

vs.

OSCAR G. TAYLOR, Defendant.

Complainant, by its solicitors, now moves the Court that it be allowed to amend its Original and Supplemental Bills in this cause as follows, viz:

On page No. 2 of the Original Bill after the paragraph which reads as follows: "Your orator would further state and show unto the Court that on April 20th, 1909, the defendant, Oscar G. Taylor,
39 and your orator entered into a written agreement duly signed and executed by the said Oscar G. Taylor, under and by virtue of which agreement Oscar G. Taylor became an employee of your orator whose duty it was as said employee to accompany such express matters of your orator on the passenger trains of the Saint Louis and San Francisco Railroad Company between Aberdeen and Amory, towns in Monroe County, Mississippi," to insert the following amendment. Your orator would further state and show unto the Court that the defendant, Oscar G. Taylor, was not employed by the Saint Louis and San Francisco Railroad Company at this time, or never became an employee of said Railroad Company while he was an employee of said Express Company and that the

said defendant, Oscar G. Taylor, was allowed to ride on the trains of the said Railroad Company solely by virtue of his being in the employ of the Express Company.

On Page No. 3 of the Original Bill after the paragraph reading as follows, viz: "Your orator further states and shows unto the Court that on or about the 10th day of February, 1910, the defendant, Oscar G. Taylor, brought a suit against the Saint Louis and San Francisco Railroad Company in the Circuit Court of the County of Monroe, State of Mississippi, for the sum of Twenty Thousand Dollars ($20,000.00) on account of the personal injuries sustained by him in the wreck of train of Saint Louis and San Francisco Railroad Company as above set Out,"—to insert the following amendment, viz: that the said suit of Oscar G. Taylor in the said Circuit Court of Monroe County, Mississippi, was not instituted under the "Employers Liability Act of 1908" and that the said Declaration in said suit alleged and charged that the said Oscar G. Taylor at the time of his injury was an employee of the Express Company. It was not claimed or charged in said suit that the said Oscar G. Taylor was in the employ of the Railroad Company at the time of said injury. A copy of the said Declaration filed in the Circuit Court of Monroe County, Miss., is hereto attached as Exhibit "A" to this motion and asked to be taken and considered as a part of same.

40 Complainants would further state and show unto the Court that there has not yet arisen in this case any controversy about the said Taylor only being employed by the said Express Company except by a construction of the written contracts between the Express Company and Taylor and the Express Company and the Railroad Company.

Wherefore Complainant states that it is necessary for it to be allowed to make these amendments in order that substantial justice may be done it in said cause.

WELLS FARGO & COMPANY,
By E. O. SYKES,
Its Attorney of Record.

SYKES & SYKES,
Sols. for Motion.

EXHIBIT "A" TO MOTION.

State of Mississippi, Circuit Court, Monroe County, March Term, 1910.

O. G. TAYLOR, Plaintiff,

VS.

THE ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Defendant.

Plaintiff by attorneys complains of defendant, a railroad corporation conducting its business in Monroe County, Miss., summoned, etc., in an action for damages and alleges first.

That the defendant is now and has been for the past twelve months and longer operating its train of cars and locomotives over its line of railroad from Aberdeen, Miss., to Amory, Miss., and other points in Mississippi. That Aberdeen is one of the termini of defendant's branch railroad line and Amory is the other terminus. That Amory, Miss., is the terminus of said branch road with the main line of defendant's railroad system through the State of Mississippi.
41 That at Amory, Miss., all expressage from Aberdeen and to Aberdeen is transferred from and to the Aberdeen Branch before mentioned.

Second. That the Wells Fargo Express Co. has been permitted by its contract for value with the defendant up to the 1st day of Jan., 1910, to ship its expressage to Aberdeen and from Aberdeen, Miss., in a car furnished by the defendant; that plaintiff was employed by the said Express Company as its messenger to accompany on the train of cars all expressage shipped to and from Aberdeen, Miss., to and from Amory, Miss., and that under said contract defendant permitted plaintiff to accompany such expressage to and from Aberdeen, Miss., and to and from Amory, Miss., on the train upon which it was transporting such expressage.

Third. That on the 8th day of Dec., 1909, while on the cars of defendant with permission of defendant and while in the employ of the Wells Fargo Express Co. and while in the discharge of his duties as its messenger and while said cars of said train being a mixed train, carrying passengers and freight defendant was making a trip from Aberdeen, Miss., to Amory, Miss., and being run at a rapid speed and without any negligence on the part of plaintiff but that solely and by reason of defendant's negligence, its agents and servants and in utter disregarrd of its duty in reference to the construction and maintaining its railroad and tracks and trestling, a trestling East of Aberdeen, Miss., which trestling was so negligently, carelessly and improperly and defectively constructed, inspected and maintained that said track of defendant and said trestling aforesaid spread, broke and gave way and the car in which plaintiff was riding and plaintiff were precipitated through said trestle the ground beneath said trestling and plaintiff's left ankle was broken and permanently injured and his body otherwise seriously bruised and injured, from which injuries he became and continues to be sick, sore, maimed and disordered and suffered and still suffers great
42 pain and distress and that he has been and will permanently be incapacitated and prevented from carrying on his usual or former occupation that of an express messenger from which he was receiving Twenty Seven Dollars and fifty Cents ($27.50) per month and he has been necessitated to expend sums of money, to-wit, Two Hundred and Fifty Dollars ($250.00) in endeavoring to be cured of his said injuries and will hereafter be necessitated to expend other and larger sums of money in endeavoring to be cured of his said injuries. To his damage Twenty Thousand Dollars ($20,000.00) and Plaintiff sues.

And Plaintiff also sues defendant for this, to wit: that the defendant is now and has been for the past twelve months and longer

operating its trains of cars and locomotives over its line of railroad from Aberdeen, Miss., to Amory, Miss., and other points in Miss. That Aberdeen is one of the termini of defendant's branch railroad line and Amory, Miss., the other terminus. That Amory, Miss., is the terminus of said branch road with the main line of the defendant's railroad system through the State of Miss. That at Amory, Miss., all expressage from Aberdeen and to Aberdeen, Miss., is transferred to and from the Aberdeen Branch road aforementioned.

Second. That the Wells Fargo Express Co. has been permitted by contract of value up to the 1st of Jan., 1910, to ship its expressage from Aberdeen and to Aberdeen, Miss., in a car furnished by the defendant. That plaintiff was employed on the 8th day of December, 1909, by said Express Co. as its messenger to accompany on the train of cars of defendant all expressage shipped to and from Aberdeen, Miss., and to and from the City of Aberdeen, Miss., and that under the said contract the defendant permitted to accompany said Expressage (to and from) Aberdeen, Miss., and to and from Amory, Miss., on the train upon which it was transporting such expressage.

Third. That on the 8th day of December, 1909, while on the cars of defendant with permission of defendant, and while in the
43 employ of the Wells Fargo Co., and while in charge of duties as its messenger and while said cars of defendant were making a trip from Aberdeen, Miss., to Amory, Miss., and being run at a rapid rate of speed and without any negligence on part of the plaintiff but that solely and by reason of defendant's negligence, its agents and servants and in utter disregard of its duty in reference to the cars of defendants attached to the engine propelling the cars composing the train in which plaintiff was making the trip on the day and date aforementioned, said train being a mixed train, that is hauling passengers and freight, and which train of cars was so carelessly, negligently, insecurely, and defectively constructed, inspected and maintained that they broke, gave way and fell apart and thereby caused the car in which plaintiff was making the trip as aforementioned to be thrown from a trestling to the ground beneath said trestling and plaintiff's left ankle was broken and permanently injured and his body otherwise seriously bruised and injured from which injuries he became and continues to be sick, sore, maimed and disordered and suffered and still suffers great pain and distress and that he has been and will permanently be injured and wholly incapacitated and prevented from carrying on his usual or former occupation, that of an express messenger from which he was receiving $27.50 per month and he has been necessitated to spend large sums of money, to-wit, $250.00, in endeavoring to be cured of his said injuries and will hereafter be necessitated to spend other and larger sums of money in endeavoring to be cured of his said injuries. To his damage $20,000.00 and therefore he sues.

PAINE & PAINE,
Attorneys for Plaintiff.

Indorsed: Motion to Amend Bills. Filed June 26, 1915.

44 *Decree Overruling Motion of Defendant (Respondent) to Dissolve the Injunction, Dismiss Bill and Tax Complainant With Costs.*

In Equity. No. 158.

WELLS FARGO & Co., Complainant,

vs.

OSCAR G. TAYLOR, Defendant.

At the regular April, 1916, Term of this Court, and on a regular day of the term, this cause came on to be heard on Motion of Respondent to dissolve the injunction and dismiss the bill and tax Complainant with all the costs; and was argued by counsel, and taken under consideration by the Court to be decided in vacation; and thereupon, upon consideration thereon in vacation, it was ordered, adjudged and decreed as follows, viz: That said motion be, and the same hereby is, in all things overruled.

Ordered, adjudged and decreed this the 19th day of September, 1916.

H. C. NILES,
Judge.

To which the Respondent then and there excepts.

Indorsed: Decree overruling Motion to Dismiss, etc. Filed Sep. 23, 1916.

In Equity. No. 158.

WELLS FARGO & Co., Complainant,

vs.

OSCAR G. TAYLOR, Defendant.

This cause came on to — heard at this the regular April, 1916, Term of this Court, and on a regular day of said Term, on motion of complainant to amend its original and supplemental bills as specified in said motion; and the same was argued by counsel
45 and taken under consideration by the Court to be decided in vacation; and thereupon, upon consideration thereof in vacation, it was ordered, adjudged and decreed as follows, viz: That said motion be, and the same hereby is, in all things sustained, and said complainant is allowed to amend its bill as prayed, to-wit:

On Page Two of the Original Bill after the paragraph which reads as follows: "Your orator would further state and show unto the Court that on April 20th, 1909, the defendant, Oscar G. Taylor, and your orator entered into a written agreement duly signed and executed by the said Oscar G. Taylor, under and by virtue of which,

your orator whose duties it was as said employee to accompany such express matters of your orator on the passenger trains of the Saint Louis & San Francisco Railroad Company between Aberdeen, and Amory, Towns in Monroe County, Miss., to insert the following amendment:

Your orator would further state and show unto the Court that the defendant, Oscar G. Taylor, was not employed by the Saint Louis & San Francisco Railroad Company at this time, or never became an employee of said Railroad Company while he was an employee of said Express Company and that the said defendant, Oscar G. Taylor, was allowed to ride on the trains of the said Railroad Company solely by virtue of his being in the employ of the Express Company."

On Page Three of the Original Bill after the paragraph reading as follows: "Your orator further states and shows unto the Court that on or about the 10th day of February, 1910, the defendant, Oscar G. Taylor, brought a suit against the Saint Louis and San Francisco Railroad Company in the Circuit Court of the County of Monroe, State of Mississippi, for the sum of $20,000.00 on account of the personal injuries sustained by him in the wreck of the train of the Saint Louis & San Francisco Railroad Company as above set out" to insert the following amendment:

"That the said suit of the said Oscar G. Taylor in the said Circuit Court of Monroe County, Mississippi, was not instituted under
46 the 'Employers Liability Act of 1908' and that the said declaration in said suit alleged and charged that the said Oscar G. Taylor at the time of his injury was an employee of the Express Company. It was not claimed or charged in said suit that the said Oscar G. Taylor was in the employ of the Railroad Company at the time of said injury."

And it is further ordered by the Court that the defendant have sixty days in which to file an answer to the amended bill of complaint, said sixty days to commence to run from the date of the filing of said amended bill.

Ordered, adjudged and decreed this the 19th day of September, 1916.

H. C. NILES,
Judge.

To the above decree of the Court, the defendant here and now excepts.

Indorsed: Decree allowing Complainant to Amend Bills. Filed Sept., 23, 1916.

Amendment to Original Bill in Equity.

In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

No. 158. In Equity.

WELLS FARGO COMPANY,

vs.

OSCAR G. TAYLOR.

And now September 21st, 1916, Complainant, by leave of Court, amends its original Bill of complaint by adding to the said bill on Page 2 after the paragraph which reads as follows:

"Your orator would further state and show unto the Court that on April 20th, 1909, the defendant, Oscar G. Taylor, and
47 your orator entered into a written agreement, duly signed and executed by the said Oscar G. Taylor, under and by virtue of which agreement, Oscar G. Taylor became an employee of your orator, whose duty it was as said employee to accompany such express matter of your orator on the passenger trains of the Saint Louis & San Francisco Railroad Company between Aberdeen and Amory, Towns in Monroe County, Miss."

the following paragraph and averments, viz:

(1) "Your orator would further state and show unto the Court that the defendant, Oscar G. Taylor, was not employed by the Saint Louis & San Francisco Railroad Company at this time and never became an employee of said Railroad Company while he was an employee of Wells Fargo & Company, and that the said defendant, Oscar G. Taylor, was allowed to ride on the trains of the said Railroad Company solely by virtue of his being in the employ of the said Complainant Express Company."

Complainant further amends its original bill of complaint by adding to the said bill on Page 3 after the paragraph which reads as follows:

"Your orator further states and shows unto the Court that on or about the tenth day of February, 1910, the defendant, Oscar G. Taylor, brought a suit against the Saint Louis & San Francisco Railroad Company in the Circuit Court of Monroe County, Miss., for the sum of $20,000.00 on account of the personal injuries sustained by him in the wreck of the train of the Saint Louis & San Francisco Railroad Company, as above set out."

the following paragraph and averments, viz:

(2) "That the said suit of Oscar G. Taylor in the said Circuit Court of Monroe County, Mississippi, was not instituted under the

Employers Liability Act of 1908, and that the said declaration in said suit alleged and charged that the said Oscar G. Taylor
48 at the time of his injury was an employee of your orator, Wells Fargo & Company. It was not claimed nor charged in said suit that the said Oscar G. Taylor was in the employ of the Railroad Company at the time of said injury. A copy of the said declaration filed in the circuit Court of Monroe County, Mississippi, is hereto attached as Exhibit "A" to this amendment, and asked to be taken and considered as a part of the same."

Also the following amendment which follows immediately after the preceding one, viz:

(3) "Complainant would further state and show unto the Court that there has not yet arisen in this case any controversy about the said Oscar G. Taylor only being in the employ of the said Wells Fargo Company, except that arising from a construction of the written contract between the said Express Company and the said Taylor, and the said Express Company and the Saint Louis & San Francisco Railroad Company."

WELLS FARGO & COMPANY,
By C. H. GARDINER,
Sec'ty.

Solicitors for Complainant.

Sworn to *me before* this 25th day of September, 1916.
[NOTARIAL SEAL] JAY D. SARGEANT,
Notary Public, New York County, N. Y.

My commission expires March 30, 1918.

STATE OF NEW YORK,
County of New York:

C. H. Gardiner, being duly sworn, deposes and says that he is the Secretary of the corporation, Wells Fargo & Company, the complainant above named, and is familiar with its business; that he has read the foregoing amendments to the bill of complaint herein and knows the contents thereof, and that the same are true to the knowledge of deponent, except as to the matters therein stated to be
49 alleged on information and belief, and as to those matters he believes them to be true.

C. H. GARDINER.

Subscribed and sworn to before me this the 25th day of September, 1916.
[SEAL] JAY D. SARGEANT,
Notary Public, New York County, New York.

My commission expires on the 30th day of March, 1918.

Indorsed: Amendments to Original Bill. Filed Sept. 27, 1916.

Answer of O. G. Taylor to the Bill, Supplemental Bill, and Amended Bill, After the Case Has Been Reversed and Remanded by the Circuit Court of Appeals.

In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

In Equity.

WELLS FARGO & Co., Complainant,

vs.

OSCAR G. TAYLOR, Defendant.

The defendant now and at all times hereafter saving and reserving to himself all and all manner of benefits and advantages of exception which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies to the said complainant's bill, supplemental bill and amended bill, for answer thereto, after the over ruling of defendant's objection to the amendments of the original and supplemental bills, answering says:

50 I.

He denies that he signed and entered into a written agreement as alleged in the bill, supplemental bill and amended bill.

II.

Denies that the trial of the suit of O. G. Taylor, vs. the St. L. & S. F. R. R. Co., in the Circuit Court of Monroe County, Miss., the complainant proved by L. B. Pettigrew, a witness, that the said O. G. Taylor had duly signed the contract, Exhibit "B" to the Bill in this cause. Avers the fact to be that said Pettigrew only testified to the fact that Taylor did sign the Exhibit "B" before mentioned; and states the fact to be further that the said defendant at said trial testified that he had not signed said contract.

III.

Submits the fact to be that the contract Exhibit "A" to the original bill in this cause made between the complainant and the St. L. & S. F. R. R. Co., and the Messenger's Agreement & Exhibit "B" alleged to have been made between Complainant and the Defendant and upon which contract and alleged agreement Complainant seeks the relief prayed for in its suit are violative of the Act of Congress of the United States, 35th Statutes, 65, Chapter 149, known as the Employers' Liability Act of 1908 and amendments and are non-enforcable in the Court of the United States of America.

IV.

Avers the fact to be that at the time of the accident to the defendant, Taylor, on March 8th, 1909 and for which he recovered in the Circuit Court of Monroe County, Mississippi, against the St. L. & S. F. R. R. Co., and which judgment was affirmed by the Supreme Court of the State of Miss., the St. L. & S. F. R. R. Co., and the complainant were common carriers by railroad and engaged in
51 handling commerce between the States of the United States of America; and that the defendant, O. G. Taylor, at the time of the injury was engaged in handling interstate commerce for complainant and the St. L. & S. F. R. R. Co.

V.

Avers the fact to be that the injury for which the defendant recovered judgment in the State Courts of Miss., was caused by the negligence of Complainant's agents or employee or partner, to-wit, the St. L. & S. F. R. R. Co.

VI.

Denies that the prosecution of the suit by defendant against the St. L. & S. F. R. R. Co., was in violation of the alleged contract with complainant and was a legal fraud upon the rights of complainant; but states the fact to be that the Contract, Exhibit "A", and the Messenger's Agreement, Exhibit "B", which the complainant seeks to enforce in this court is contrary to and in violation of the Act of Congress of the U. S. of America as passed and enacted by Congress on April 22nd, 1908, 35th Statutes at Large, 65, Chapter 149; and is unenforceable in the Court of the United States of America.

VII.

Respondent avers the fact to be that at the time of the injury to him the complainant and the St. L. & S. F. R. R. Co., were partners or co-proprietors engaged in the handling of inter-state commerce by railroad; and that respondent was an employee of the complainant and the St. L. & S. F. R. R. Co., at the time of his injury.

IX.

Respondent submits to the Court that it appears from the bill and exhibits thereto that the complainant originally sought its remedy in the Circuit Court of Monroe County, Miss., and that on a
52 judgment being entered against it by the Court of Miss., it failed and refused to appeal the judgment so rendered to the Supreme Court of the State of Miss., which said Court is the final appellate court of the State of Miss. The Complainant thus voluntarily abandoned its rights in the State Court of Miss., by failing to appeal the judgment to the Supreme Court of the State of Miss.,

and to the U. S. Supreme Court, and began this suit in this Hon. Court. Complainant states the fact to be that by abandoning the State Court after having voluntarily sought its jurisdiction, without having first exhausted its rights by appeal to the Supreme Court of the State of Miss., this Court is without jurisdiction to maintain the suit.

X.

Complainant states the fact to be that this Court is without jurisdiction to maintain the present suit because by taking jurisdiction and granting relief under the bill, supplemental bill and amended bill in this cause, the Court would be acting contrary to the statutes made and approved by the Congress of the U. S. of America by interfering with the jurisdiction of the State Court of Mississippi, previously acquired in the case of O. G. Taylor vs. the St. L. & S. F. R. R. Co., in which case the complainant voluntarily made an appearance and on judgment being entered against it failed to prosecute its appeal to the State Court of Miss.

XI.

Respondent further avers that under the decree of reversal and remand of this cause by the Circuit Court of Appeals this Court is without authority to allow the original and supplemental bills to be amended.

XII.

That the decree of reversal by the Circuit Court of Appeals of date, February 8th, 1915, was a final decree upon the merits
53 of the litigation and terminated the rights of Complainant in this Court until after reversal of the decree of the Circuit Court of Appeals by the Supreme Court of the United States of America.

XIII.

That the decree in this cause by the Circuit Court of Appeals, of date February 8th, 1915, was a final decree deciding the case upon its merits and was alone reviewable by the Supreme Court of the United States and hence the District Court has no authority to allow the amendments granted the complainant by the decree of the Court of September 23, 1916. Avers the facts to be that this Court erred in overruling the motion of the respondent to dismiss the bill, dissolve the injunction, etc., which said motion was made in conformity with the decree of the Circuit Court of Appeals in this cause of date February 8th, 1915.

XIV.

Avers the fact to be that this Court has no authority to sustain the motion of Complainant to be allowed to amend its original and supplemental bills, as decreed on Sept. 23, 1916.

XV.

And having fully answered the respondent prays that the bill be dismissed and the injunction dissolved and defendant go hence with his costs in this cause.

PAINE & PAINE,
O. G. TAYLOR.

Sworn to and subscribed before me this the 20th day of June, 1916.

W. J. MONETTE,
Notary Public.

[SEAL.]

Indorsed: Answer of O. G. Taylor to Amended Bill after Reversal and Decree Allowing Amendment. Filed September 27, 1916.

54 *Agreement.*

In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

In Equity.

WELLS FARGO & Co.

vs.

OSCAR G. TAYLOR.

It is hereby agreed by and between both parties to this suit, that in case of another trial of same in this Court, either party may introduce and use as evidence on said trial all of the stenographer's notes together with the exhibits of the testimony taken at the first trial, or may use the notes of testimony of any witness, together with the exhibits as shown by said notes, and may use as evidence the notes and all papers of the case of O. G. Taylor vs. S. L. & S. F., which case was tried in the Circuit Court of Monroe County, Miss.

It is further agreed that either side may also introduce other oral testimony in said cause.

Objections may be made at the hearing of said cause to either the testimony introduced orally or to that read from the Stenographer's notes, or to both.

SYKES & SYKES,
Solicitors for Complainant.
PAINE & PAINE,
Solicitors for Defendant.

Indorsed: Agreement of Counsel as to Introduction of Certain papers. Filed October 5, 1916.

55 *Narrative Statement of the Testimony.*

In the United States District Court for the Eastern Division of the Northern District of the State of Mississippi.

In Equity.

O. G. TAYLOR, Appellant,

vs.

WELLS FARGO & Co., Appellee.

Now comes O. G. Taylor, the appellant in the above styled cause and files this his statement of the evidence introduced at the hearing from the order granted in which an appeal has been granted.

L. B. PETTIGREW, a witness for appellee, testified as follows: that he testified at a former trial of this case in this court. That he employed O. G. Taylor as a messenger for the appellee and had a talk with him as to what he was doing at that time. That the appellant said at the time of the employment that he had been express messenger for the Southern Express Company. That Taylor made out the application for employment in which he stated that he had been express messenger for the Southern Express Company. That as far as he, Pettigrew, knew Taylor was not in the employ of the St. L. & S. F. R. R. Co., when he employed him for the complainant Express Company. That if he had been, he would have put it in the application blank. That at the time he employed Appellant he did not employ him as a joint agent of the Railroad Company and the Appellee but employed him exclusively for the Appellee to handle their express only. That he had the authority to employ Appellant and that none but an officer of the company had the authority to discharge him. The Route Agent of the Appellee had the right to control and direct Appellant's services. The St. L. & S. F. R. R. Co., had nothing to do with the employment of Taylor, the appellant. The St. L. & S. F. R. R. Co., had no
56 right to discharge the Appellant. The Appellee alone had the right to discharge him. That he had the right to discharge him. That he was not then in the employ of the Appellee. Witness had no knowledge of ever having read the contract made by appellee and the St. L. & S. F. R. R. Co., and that he did not know the contents of the said contract. That he employed other employees of the St. L. & S. F. R. R. Co., as agents for the Wells Fargo & Co., and quite a number of them were so employed as joint agents.

R. D. GRIFFIN, a witness for the appellee, testified as follows: That he was a conductor on the St. L. & S. F. R. R. Co., between Aberdeen and Amory, Miss., on the 8th of December, 1909, on which date the appellant was injured but was not on the train. The appellant was an express messenger for appellee and was not working

for the railroad at that time. That Lewis Griffin was baggage master on said train and appellant had nothing to do with the operation, the management or the work of the train. That the Conductor has charge of the train and that he kept the time slips of the train crew and makes out their time slips and that he had never made out any time slips for appellant. That the Conductor has nothing to do with the express men except to see that they conduct themselves right. That appellant was working as express messenger in the same car with the baggage man and in a car furnished by the St. L. & S. F. R. R. Co. That the said Railroad Co., furnished the heat and lights for the car and its means of locomotion, in which the appellant was riding. That the office of the Appellee was in the station house of the St. L. & S. F. R. R. Co., in Aberdeen, Miss. That the employees of the Railroad Company, on this branch train, were Conductor, Baggage-man, Fireman, Flagman, and Engineer.

Counsel for the Appellee the- offered in evidence the following:

57 Exhibits "A" and "B."

Exhibit "C" declaration in the case of O. G. Taylor vs. St. L. & S. F. R. R. Co., in the Circuit Court of Monroe County, Miss.

Exhibits "D," "E," "F," "G," "H," "J" and "K."

EXHIBIT "A."

Wells Fargo & Company.

Application for Employment.

ABERDEEN, MISS., April 20th, 1909.

I hereby make application to Wells Fargo & Company for employment in its express service, and that for that purpose have made and signed this application in my own hand writing.

In consideration of my employment, I agree to faithfully observe all rules and regulations of the Company, and all instructions that I may receive respecting the Company's business, promising to serve honestly, loyally, faithfully and to the best of my ability, refraining from the use of intoxicating liquors or other stimulants to excess; not to enter into any enterprise, association, society or business which will interfere with my duties to the company.

Furthermore, as I may be required to render service for the Company on and about the railroad, state and steamboat lines used by it for forwarding property, and knowing that such employment is hazardous, I agree to assume all risk of personal injuries which I may sustain in the course of my employment, whether occasioned by negligence or otherwise. And I further agree to furnish a fidelity bond acceptable to Wells Fargo & Company.

I understand that persons employed by the Company are not engaged for any particular time, and the Company reserves the right to terminate the services of any employee at pleasure.

Therefore, in executing this application, I acknowledge and agree to abide by such conditions, and accept employment subject to discharge at any time by the Company or its Agents, with pay to date of discharge.

58 Name in full: Oscar Greenberry Taylor.

Residence: Aberdeen, Miss.

Place and date of birth: Near Aberdeen in Monroe Co., May 7, 1862.

Parents' name and residence:

Father: Deceased.

Mother: Rebecca Taylor, Quincy, Miss.

Wife's name: Margaret Taylor.

My last employers, occupation and the reasons of their termination have been as follows:

From May, 1907, to April, 1909: in the service of the Southern Ex. Co.; Position, Messenger; Place, Aberdeen, Miss.; Reason for leaving, Still in Service.

By whom employed at present: Southern Express Co., G. W. Agee, Supt.

State what experience, if any, you have had in the express business, and whether you have ever been in the employ of this Company before: Two years as messenger.

Reference: Southern Express Co., G. W. Agee, Supt.

O. G. TAYLOR,
Applicant.

Witness:
L. B. PETTIGREW,
C. R. A.

EXHIBIT "B."

Agreement between Wells Fargo & Company and Oscar G. Taylor, omitted from the printed record, being heretofore printed at page 23 as Exhibit "B" to Bill of Complaint.

* * * * * * *

EXHIBIT "C."

Declaration in suit of O. G. Taylor vs. St. Louis & San Francisco R. R. Co., omitted from the printed Record, being heretofore copied at page 40 as Exhibit "A" to Motion to Amend Bill.

* * * * * * *

59 EXHIBIT "D."

Aberdeen Office, State of Miss., Dec. 10, 1909.

Wells Fargo & Co. Express, To O. G. Taylor, Dr.

In full for services to date, as Messenger, from 11/1, 1909, to 11/30, 1909 @ $27.50

Payment received,
(Signed) O. G. TAYLOR.

Examined and found correct by
(Signed) J. R. YOUNG,
Agent.

EXHIBIT "E."

Wells Fargo & Co. Express, To O. G. Taylor, Dr.

For Services as Messenger, Aberdeen Branch, May, 1909.... $27.50

Received payment,
Aberdeen office, Miss., 6/3, 1909.
(Signed) O. G. TAYLOR.

Examined by me and found correct.
(Signed) J. R. YOUNG,
Agent.

EXHIBIT "F."

Wells Fargo & Co. Express, To O G. Taylor, Dr.

July 1. For Messenger, Aberdeen & Amory $27.50

Received payment.
Aberdeen, Miss., Office, July 1, 1909.
(Signed) O. G. TAYLOR.

Examined by me and found correct.
(Signed) J. R. YOUNG,
Agent.

60 EXHIBIT "G."

Wells Fargo & Co. Express, To O. G. Taylor, Dr.

7/31. For Messenger Aberdeen & Amory, July 1 to 31, 1909 ..... $27.50

Received payment.
Aberdeen, Miss., Office, July 31, 1909.
(Signed) O. G. TAYLOR.

Examined by me and found correct.
(Signed) J. R. YOUNG,
Agent.

EXHIBIT "H."

Aberdeen, Miss., Office, August 31, 1909.

Wells Fargo & Co. Express, To O. G. Taylor, Dr.

In full for all services to date, as Messenger Amory & Aberdeen Rte., from Aug. 1, 1909, to 31, 1909, @..... $27.50

Payment received.
(Signed) O. G. TAYLOR.

Examined and found correct by

——— ———,
Agent.

EXHIBIT "J."

Wells Fargo & Co. Express, To O. G. Taylor, Dr.

For Salary Sept., as Messenger Aberdeen Branch..... $27.50

Received payment.
Aberdeen Office, State of Miss., Oct. 2, 1909.
(Signed) O. G. TAYLOR.

Examined by me and found correct.
(Signed) J. R. YOUNG,
Agent.

61 EXHIBIT "K."

Wells Fargo & Co. Express, To O. G. Taylor, Dr.

For Salary Mess., Mo. of October..... $27.50

Received payment.
Aberdeen Office, State of Miss., ...190...
(Signed) O. G. TAYLOR.

Examined by me and found correct.
(Signed) J. R. YOUNG,
Agent.

Respondent here objected to the Exhibits "A" and "B" and assigned the following causes:

1st. Because they are contrary to public policy; since by it the St. L. & S. F. R. R. Co., a common carrier by railroad, seeks to relieve itself from liability from the gross negligence of its agents and employees, on account of which gross negligence the defendant while lawfully on said train of said railroad company as an employee of said railroad company was injured.

2nd. Because the contract and messengers agreement is contrary to public policy because by it the Appellee, a common carrier by railroad, is seeking to relieve itself from liability of the gross negligence of its agents and employees or partner or co-proprietor, to-wit, the St. L. & S. F. R. R. Co.

3rd. Because it is void and unenforce-able as violative of the provisions of an Act of Congress of April 22nd, 1908, Chapter 149, 35th Statutes at Large, page 65, Sections 1 and 5 thereof, and amendments thereto.

The Respondent then moved the Court to dismiss the bill and dissolve the temporary injunction because

1st. The bill is without equity on its face.

62 2nd. Because the contract upon which appellee's case is based and under which is [it] seeks relief is contrary to public policy because by it the St. L. & S. F. R. R. Co., a common carrier by railroad, seeks to relieve itself from liability of the gross negligence of its agents and employees on account of which gross negligence the Respondent while lawfully on said train of said railroad company as an employee of said railroad company was injured.

3rd. Because the contract is contrary to public policy because by it the appellee, a common carrier by railroad is seeking to relieve itself from liability of the gross negligence of its agents and employees or partner or co-proprietor, to-wit, the St. L. & S. F. R. R. Co., in the course of its business, on account of which gross negligence, the Respondent while lawfully on said train of said Railroad Co., the agent or employee, or partner or co-proprietor of Complainant, was injured.

4th. Because the evidence discloses the fact that the Appellant was injured while handling interstate commerce and the messengers agreement, the basis of complainant's suit is void and unenforce-able as violative of the provisions of an Act of Congress of April 22nd, 1908, Chapter 149, 35th Statutes at Large, page 65, Sections 1 and 5 thereof, and amendments thereto.

5th. Because it is contrary to public policy and the comity of courts for this court to grant the prayer of relief of the bill for injunction restraining the respondent from issuing execution to collect a judgment obtained in the State Courts of Miss., against the St. L. & S. — R. R. Co., a court of concurrent jurisdiction with this District Court; as it would be an interference with the jurisdiction of the State Court first had and obtained in the above styled cause.

6th. Because by taking jurisdiction and granting the Complaint the relief prayed for with injunction restraining the Respondent from issuing execution to collect a judgment obtained by

63 him in the case against the St. L. & S. F. R. R. Co., in the State Courts of Miss., this Court would be acting contrary to the statutes made and approved by Congress, to-wit, Section 720 R. S.

7th. Because it appears from the record and the evidence in the case that the Complainant voluntarily sought the jurisdiction of the Circuit Court of the State of Miss., in the case of O. G. Taylor vs. St. L. & S. F. R. R. Co., requesting that it be made a defendant with

the said Railroad Co., and that upon being denied this by said Court the said Complainant did not exhaust its remedy given it in the State Court by appeal to the Supreme Court of Miss., on this adverse ruling but abandoned the same and filed this suit in the U. S. District Court.

8th. Because it appears from the evidence and record in this cause that the messenger's agreement between the Complainant and the Respondent and the contract between the Complainant and the St. L. & S. F. R. R. Co., was offered in evidence by the Railroad Co., in the case in the State Court of Miss., of Respondent vs. the St. L. & S. F. R. R. Co., and the messenger's agreement upon which the Complainant now seeks relief was held void and unenforceable by the Circuit and Supreme Courts of Miss., and no appeal was prosecuted to the Supreme Court of the U. S. from said judgment and the said judgment and rulings stand unreversed and this Court is bound by the construction and ruling and judgments of this State Court until reversed by the United States Supreme Court.

9th. Because it appears from the record in this cause that on the former appeal to the Circuit Court of Appeals in case No. 2716 that after the case was reversed by the Circuit Court of Appeals holding there was no equity on the face of the bill, the Complainant requested the Circuit Court of Appeals to permit an amendment to be made to the bill or to direct the District Court to allow an amendment,
64 which said request and motion was overruled by the Circuit Court of Appeals and since this was a final decree the District Court has no power or authority to grant the Complainant the right to amend the bill on reversal and the District Court on the remanding of this cause from the Circuit Court of Appeals should have sustained the motion of Respondent to dismiss the bill and dissolve the injunction.

Whereupon the District Court reserved its ruling until the Appellant should introduce and conclude his testimony.

Thereupon J. R. YOUNG, a witness for Respondent, testified as follows:

That he was employed in the year 1909 at Aberdeen, Miss., as the agent of the St. L. & S. F. R. R. Co., and the Appellee and was so employed at the time Appellant was injured in the wreck on the St. L. & S. F. R. R. Co. train. That Appellant handled interstate and intrastate express matter between Amory and Aberdeen, Miss. That the Appellant also helped and assisted in loading and unloading baggage on every trip that he made. This fact was known to the witness as agent for the St. L. & S. F. R. R. Co. That the Appellee was furnished a room cut off and apart from the business of the Railway Company and paid for the space in the depot of the St. L. & S. F. R. R. Co., at Aberdeen, Miss., for its express matter. That he was the joint agent for the railroad company and the Appellee but kept separate accounts. That Appellant was employed by the Appellee as messenger and was not in the employ of the Railway Company, so far as he knew. That whatever handling of baggage was done by Appellant was done as an accommodation for the

baggage master on the train and that the Express Company paid his, Taylor's salary so far as he knew, and the railroad company did not pay him one cent.

65 Respondent here offered in evidence the transcript of the stenographic notes of all the evidence taken on the first trial of this cause of the testimony of Pettigrew and O. G. Taylor, the Appellant, also agreements and testimony taken on the trial as shown by the transcript of said stenographic notes taken on said former trial.

Narrative Statement of Testimony.

"In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

In Equity.

O. G. TAYLOR, Appellant,

vs.

WELLS FARGO & Co., Appellee.

Statement of the Evidence.

Now comes O. G. Taylor, defendant in the above styled and numbered cause and filed this his statement of the evidence introduced on the hearing, from the order granted in which an appeal has been taken:

L. B. PETTIGREW, a witness for the Appellee, being duly sworn, testified as follows:

That he is not at this time connected with the Appellee. But was chief route agent for it during 1909. That he is acquainted with the Appellant. Aberdeen, Miss., was in his division in 1909 and he hired some of the express messengers at that time. That he employed O. G. Taylor as express messenger for Appellee. He then identified the Application for Employment signed by O. G. Taylor which he stated O. G. Taylor signed and that he signed as witness. That it was signed in the office of the agent for the St. L. & S. F. R. R. Co., on April 20th, 1909, in Aberdeen, Miss. That the Appellant examined it before signing it. Which application is offered in evidence as Exhibit "A." Witness examined and identified a paper marked Exhibit "B" styled Wells Fargo & Co.

66 Messenger's Agreement; that this agreement was also signed by O. G. Taylor in his presence. That appellant examined it before signing and was signed by appellant in the office of the agent of the St. L. & S. F. R. R. Co., in Aberdeen, Miss. And offered the same in evidence as Exhibit "B."

Counsel for the Appellant objected to the introduction of this contract, Exhibit "B," and assigned the following reasons:

1st. Because it is contrary to public policy, because by it the St. L. & S. F. R. R. Co., a common carrier, attempts to relieve itself from liability for the gross negligence of its agents and employees in the course of its business, on account of which gross negligence the Appellant, as express messenger while lawfully on said train of said railroad company by permission of said railroad company was injured.

2nd. Because the contract is contrary to public policy because by it the appellee in this case is making an attempt to relieve itself from liability from the gross negligence of its agents and employees.

3rd. Because it is void and unenforcable under the Act of Congress of April 22nd, 1908, Chapter 149, 35 Statutes at Large, page 65, Sections 1 and five thereof.

Which motion the Court overruled for the present.

On cross-examination:

Witness stated that at the time of appellant's employment Appellee was engaged in interstate and intrastate business. That at the time of the signing of the contract Mr. Young, the agent for the St. L. & S. F. R. R. Co., at Aberdeen, Miss., was present. And said Young was the agent at Aberdeen, Miss., also for the Appellee.

Counsel for Appellee here admitted in open Court that at the
67 time of the injury of appellant, that the appellee was engaged in interstate and intrastate business as a common carrier and that appallent was so engaged at the time of his injury. Witness further stated that at all stations on the St. L. & S. F. R. R. Co., between Memphis, Tenn., and Aberdeen, Miss., that the agent for said Railroad Co. was also the agent of the Appellee except at Tupelo and New Albany, Miss. That Mr. Young, the agent for the Appellee in Aberdeen, Miss., at the time of the trial of this cause was taking place.

This was all the testimony offered by Appellee.

At the conclusio[illegible] f this testimony, appellant by his counsel moves the Court to di[illegible]iss the bill of complaint and grant a decree for the defendant and assigned the following causes; to-wit:

1st. Because the contract upon which Appellee's case was based and under which he asked relief was contrary to public policy because by it the St. L. & S. F. R. R. Co., a common carrier attempted to relieve itself from liability from the gross negligence of its agents and employees in the course of its business on account of which gross negligence the Appellant, an express messenger while lawfully on the train of the R. R. Co., and with the permission of the R. R. Co., was injured.

2nd. Because the contract is contrary to public policy because by it the Appellee a common carrier by railroad attempts to release itself from liability of the gross negligence of its business on account of

which gross negligence the appellant, while acting as express messenger for the Appellee and while lawfully on the train of the St. L. & S. F. R. R. Co., the agent of the Appellee, by permission of the R. R. Co., was injured.

3rd. Because the contract upon which bases its right to relief is void and unenforcable because it is contrary to a provision of the Act of Congress of April 22nd, 1908, Chapter 149, 35 Statutes at Large, page 65, Sections 1 and 5 thereof.

68 4th. Because by taking jurisdiction and granting relief under the bill of appellee this court would be acting contrary to the statute made and approved by the Congress of the U. S. and would be an interference of the jurisdiction of the State Court of Miss., previously acquired in the case of Appellant vs. the St. L. & S. F. R. R. Co.

To the Motion the Court then requested the appellant to place any proof he may desire as to the merits of his controversy and reserved his ruling as to the objections to the introduction of the contract and reserved his ruling as to the objections made by appellant, to be taken under advisement and decided in vacation as of this term.

Appellant then Offered the Following Testimony:

O. G. TAYLOR, a witness in behalf of himself, duly sworn, testified as follows:

Witness testified that he did not sign the messenger's contract and had no knowledge of such contract until after he received through the mail a similar paper which he refused to sign but returned to Mr. Calkins, the Supt. of the Appellee. That he had no knowledge of the contract offered in evidence having been presented to him by Mr. Pettigrew. He said he refused to sign the one sent him through the mails because such a contract would be an injustice to himself and his family and that he would have resigned his position before he would have signed such a contract. That after he received the injury for which he sued the St. L. & S. F. R. R. Co., that Mr. Calkins, the Supt. of the Appellee came to see him and told him that he had signed the messenger's agreement; and that he and the said Supt. had a hot dispute over it as to what he was to do. That he told the said Supt. that if he had his signature to the messenger's agreement he sure got it from some other source and not from him and that this caused the dispute.

That at the time of the accident he was handling express packages in and out of the state and other states; that he remembers

69 handling packages from Miss. consigned to Birmingham Ala. That he handled packages consigned to parties in the State and parties out of this State.

On cross-examination:

He stated that Mr. Pettigrew was in Aberdeen but he did not remember the date. Here witness was shown an application for position which he said he signed. He was asked if he signed the

messenger's agreement which was offered in evidence; witness denied that he signed it; denied that it was his signature; denied that he wrote Oscar Greenberry Taylor. That during his employment with Appellee he signed many monthly receipts for his salary and the receipt offered in evidence dated 6/3/1909 appears to be his signature and as a matter of fact was his signature; which was offered in evidence and marked Exhibit "A" to his testimony.

EXHIBIT "A."

Exhibit "A" omitted from printed record, being heretofore copied at page 59, as Exhibit "E."

* * * * * * *

Receipt dated July, 1909 was also signed by him and was offered as Exhibit "B" to his testimony. The exhibit "C" was also signed by him.

EXHIBIT "B."

Exhibit "B" omitted from the printed record, being heretofore printed at page 59 as Exhibit "F."

* * * * * * * *

Witness also said that he signed Exhibits D, E, and F.

EXHIBIT "C."

Exhibit "C" omitted from the printed record, being heretofore copied at Page 60 as Exhibit "G."

* * * * * * *

Witness also said that he signed Exhibits D, E, and F.

76 EXHIBIT "D."

Exhibit "D" omitted from the printed record, being heretofore printed at Page 60 as Exhibit "H."

* * * * * * *

EXHIBIT "E."

Exhibit "E" omitted from the printed Record, being heretofore printed at Page 60 as Exhibit "J."

* * * * * * *

EXHIBIT "F."

Exhibit "F" omitted from printed record, being heretofore printed at Page 61 as Exhibit "K."

* * * * * * *

Witness testified that he signed the answer to the motion for a temporary injunction on May 20th, 1910. He also signed the demurrer dated May 19th, 1910. He also signed the papers of Oct. 3rd, 1910, and the demurrer to the supplemental bill of Oct. 3rd, 1910, and the answer on the 28th day of June, 1910. He then admitted that he signed Exhibit "F." Stated that his full name was Oscar Greenberry Taylor. And he supposed that he signed an application for bond at the time he signed the application for employment.

Redirect examination:

Said he signed many other papers because he had to make daily reports. Said he supposed he was in the employ of appellee for six months.

Recross-examination:

Said he mailed all of his daily reports to Mr. Calkins, the Supt.

This was all of the testimony offered.

71 We, the solicitors for the complainant and the respondent in the suit of Wells Fargo & Co., vs. Oscar G. Taylor agree that the foregoing is a true, complete and properly prepared statement of the evidence introduced on the hearing from the order in which an appeal has been taken.

PAINE & PAINE,
SYKES & SYKES.

The foregoing having been approved by the solicitors of the respective parties is now approved by me and the Clerk is directed to file the same as the statement of the evidence introduced on the hearing referred to.

This the 3rd day of Oct., 1914.

H. C. NILES,
Judge."

The counsel for Appellee here admitted that the Appellee took no appeal or further proceedings in the Circuit Court of Monroe County, Miss., in the case of O. G. Taylor, vs. St. L. & S. F. R. R. Co., after appellee's petition to be made a party defendant in that Court has been denied by said Court.

Respondent then offered in evidence the motion of the Appellee made in the Circuit Court of Appeals on the former appeal of this case, numbered 2716, in which motion the Appellee, after the case had been reversed, requested the Circuit Court of Appeals to permit the bill to be amended or to direct the District Court to permit the amendment to the bill.

Respondent then introduced the order of the Circuit Court of Appeals in the above styled cause overruling said motion of Appellee; which is in words and figures as follows:

72 United States Circuit Court of Appeals, Fifth Circuit.

No. 2716.

OSCAR G. TAYLOR

vs.

WELLS FARGO & COMPANY.

Appeal from the United States District Court, Northern District of Mississippi.

Before Pardee and Walker, Circuit Judges, and Maxey, District Judge.

By the Court: After a full consideration, the petition for rehearing in the above numbered and entitled case is denied.

(Original filed April 5th, 1915.)

(Certificate.)

United States Circuit Court of Appeals for the Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing one page, numbered 1, contains a true copy of the Order Denying Rehearing in the case of Oscar G. Taylor, Appellant, versus, Wells Fargo & Company, Appellees, No. 2716, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 8th day of April, A. D. 1915.

[SEAL.] FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

73 The Respondent then offered in evidence the Affidavit of W. T. Ware, Circuit Clerk of Monroe County, Miss., which is in words and figures as follows, to-wit:

Affidavit of W. T. Ware, Circuit Clerk.

STATE OF MISSISSIPPI,
Monroe County:

This day personally appeared before me the undersigned authority, W. T. Ware, who after being duly sworn by me, deposes and says that he is the Circuit Clerk of Monroe County, State of Mississippi. That on or about the 10th day of February, 1910, Oscar G. Taylor

filed a suit in the Circuit Court of Monroe County against the Saint Louis & San Francisco Railroad Company for the sum of Twenty Thousand Dollars ($20,000.00) for personal injuries alleged to have been sustained by him on or about December 8th, 1909, in the wreck of the Aberdeen and Amory Branch train near Aberdeen, Mississippi. That said Taylor was riding on said train under and by virtue of his employment as an express messenger of Wells Fargo & Company. That on or about the 14th day of March, 1910, defendant Railroad Company filed a plea of the general issue and three general pleas. The said special pleas setting out the fact that the said Plaintiff, Oscar G. Taylor, had signed a messenger's agreement when he entered the service of Wells Fargo & Company, that in case of any injury to himself that neither the Railroad Company, nor the Express Company should under any circumstances or in any case be liable for any injury sustained by him. That one of the said special pleas further set up the fact that the defendant Railroad Company and the Express Company had entered into a contract, by which the Express Company agreed to indemnify the Railroad Company for any damage or amount of money it might have to pay to any employee of the Express Company on account of any injury sustained by any said employee.

That the said Wells Fargo & Company, on the 14th day of March, 1910, filed a petition in the Circuit Court of Monroe County,
74 in which it stated that it was the real party in interest by virtue of the messenger's agreement and the contract between it and the Railroad Company (a copy of which agreement and contract are made a part of the petition) and asked that it be made a party defendant to the said suit.

That on or about the same date, the defendant Railroad Company made a motion to require the plaintiff to join the said Express Company as a party defendant. That upon a hearing the Circuit Judge overruled the petition of Wells Fargo & Company and the motion of the defendant Railroad Company and declined to make said Wells Fargo & Company a party defendant to the said suit.

That at the June Term, 1910, of the Circuit Court of Monroe County, this case came on for trial before a jury, and, after the introduction of all the testimony, upon motion of plaintiff, the Circuit Judge excluded all the testimony about the signing of the Messenger's agreement by Oscar G. Taylor and held that the defendant Railroad Company could not legally defend its suit upon the ground of Taylor's having signed the said agreement which released the defendant from any liability in case of injury.

That the said Circuit Judge instructed the jury that under the testimony in the case, the Plaintiff, Taylor, was entitled to recover damages for his injury as shown by the testimony.

That before the case was tried upon its merits, the defendant Railroad Company made a motion for a continuance, which was overruled. The jury returned a verdict in favor of the Plaintiff for Four Thousand Dollars ($4,000.00). The defendant made a motion for a new trial, which was overruled.

The defendant has since filed its petition and bond for an appeal of the case to the Supreme Court of the State of Mississippi. The transcript for the same has not yet been made out by me.

An inspection of the assessment rolls of Monroe County, Mississippi, shows that Oscar G. Taylor is assessed with the following real and personal property, viz: Assessment rolls show nothing.

W. T. WARE,
Clerk of the Circuit Court.

Sworn to and subscribed before me this the 20th day of Sept., A. D. 1910.

C. P. SMITH,
Chy. Clerk,
By S. H. CROSBY,
D. C.

Indorsed: Affidavit of W. T. Ware. Filed Sept. 28, 1910.

This was all the testimony of the Appellant and the Appellant then renewed its motion made at the conclusion of the Appellee's testimony.

The Court here reserved its ruling to be decided in vacation.

We, the solicitors for the Appellant and the Appellee, in the suit of Wells Fargo & Co. vs. Oscar G. Taylor, agree that the foregoing is a true, complete and properly prepared statement of the evidence [evidence] introduced on the hearing from an order in which an appeal has been taken.

PAINE & PAINE,
Solicitors for Appellant.
SYKES & SYKES,
Solicitors for Appellee.

The foregoing having been approved by the solicitors of the respective parties is now approved by me and the Clerk is directed to file the same as the statement of the evidence introduced on the hearing referred to.

This the 19th day of May, 1917.

H. C. NILES,
Judge.

Indorsed: Narrative Statement of Testimoney. Filed May 21, 1917.

76 *Opinion on Motion to Dismiss Bill, etc.*

In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

In Equity. No. 158.

WELLS FARGO & COMPANY, Complainant,

vs.

O. G. TAYLOR, Defendant.

This cause is before the Court on Motion of defendant to dissolve the injunction and dismiss the bill, upon the grounds mainly that this Court was without jurisdiction to grant the injunction and no equity is shown on the face of the bill.

It will be recalled that, in a former hearing of this cause, this Court granted a temporary injunction restraining the defendant from proceeding to collect a judgment against the St. Louis & San Francisco Railroad Company obtained in the Circuit Court of Monroe County, Mississippi, and afterwards affirmed by the Supreme Court of Mississippi. This temporary injunction was, by this Court, at a later date made perpetual.

The cause was then carried to the Circuit Court of Appeals for the Fifth Circuit, the questions involved, both of law and fact, having been before this Court and thoroughly threshed out, as shown by the opinions and rulings on file with the pleadings in this cause.

The Circuit Court of Appeals reversed and sent the case back for a rehearing, because of certain imperfections of the bill, in that it failed to allege and prove by testimony, that the defendant was not jointly employed by the Express Company and Railroad Company, and, for this reason the Employers' Liability Act of 1908, could not be invoked, and in consequence, no equity showed on its face.

Complainant upon motion was thereafter allowed to amend its original bill reciting the fact that defendant was not a joint employee of the two companies, nor was he at the time of his injury. At the hearing proper proof was made of this fact.

77 Because of the Court's rulings, made upon every one of the questions involved at former hearings of the cause, and since, after careful consideration, no additional reasons are advanced to change the Court's position, it is considered that the bill, as amended, with the proof as offered, is sufficient, and the Complainant entitled to the relief sought.

One interesting question arising in this cause, in the judgment of the Court, has been definitely and conclusively settled very recently by the Supreme Court of the United States in the case of Robinson vs. Baltimore & Ohio Railroad Company, 237 U. S., 84.

This question involving the construction of the Federal Employees' Liability Act, was, as to whether the Railroad Company and the Pullman Company were partners or exercising a partnership

relation or whether their joint business created an agency relationship, and thus creating a liability.

In the case of Robinson vs. Baltimore & Ohio Railroad Company, just cited, it is laid down

"In a suit for personal injuries under the Employers' Liability Act, a contract between the plaintiff and a third party may be admissible in evidence on the trial to show that Plaintiff was not defendant's employee even though a demurrer had been sustained to a special plea that the contract contained a release of liability.

"A contract between the Pullman Company, as employer, and its employe releasing the employer, and also all railroad corporations over whose lines the employer's cars were operated, from all claim of liability in personal injury sustained by the employee, held in this case valid unless the employe of the Pullman Company was also the employe of the Railroad Company, in which case that provision of the contract would be invalid under Section 5 of the Employers' Liability Act.

"Congress in legislating on the subject of carriers by rail was familiar with the situation and used the term employe in its natural sense and did not intend to include as employes of the carrier
78 persons on interstate train engaged in various services for other masters."

The law as thus announced is regarded as controlling in the instant case, and compelling as to Complainant's equity as prayed in its bill.

Let a decree enter in accordance with the foregoing.

H. C. NILES,
Judge.

Indorsed: Opinion of the Court on Defendant's Motion to Dismiss the Bill, etc. Filed March 7, 1917.

Final Decree.

In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

In Equity. No. 158.

WELLS FARGO & COMPANY

vs.

OSCAR G. TAYLOR.

This cause came on to be heard in open court at the regular October Term of said court, A. D. 1916, and was argued by counsel and was taken under consideration by the Court to be decided in vacation; and thereupon, upon consideration thereof in vacation, and it appearing to the Court that all the allegations of the Original Bill, and the amendments thereto, and the supplemental bill, are true

as therein stated, and that the institution and prosecution of the suit in the State Courts of Mississippi by the defendant, Oscar G. Taylor, against the St. Louis & San Francisco Railroad Company, was in direct violation of the Messenger's agreement, a contract entered into between the said Taylor and the Complainant, Wells Fargo & Co., and was a fraud practiced by the said Taylor upon the complainant; it is therefore ordered, adjudged and decreed as follows, viz:

79 That said motion of the defendant to exclude the testimony introduced by the complainant, be and the same is hereby overruled;

That the defendant, the said Oscar G. Taylor, be required, and he is hereby ordered to carry out and perform the terms and conditions of said "Messenger's Agreement" as follows, viz:

That the said defendant, Oscar G. Taylor, within thirty days after the signing of this decree, shall execute and deliver to the complainant a contract or agreement or release whereby the said defendant, Taylor, releases the said complainant and the Saint Louis & San Francisco Railroad Company from all damages of every character whatsoever for personal injuries sustained by the said Oscar G. Taylor, on or about the 8th day of December, 1909, caused by the derailment of a car of the Saint Louis and San Francisco Railroad Company, in which the said Oscar G. Taylor was riding at said time.

It is further ordered, adjudged and decreed that a perpetual injunction be issued in this suit against the said defendant, his heirs, assigns and all claiming under or through him, restraining and enjoining him or them from collecting or in any matter attempting to collect the judgment against the Saint Louis and San Francisco Railroad Company, and its surety, the United States Fidelity and Guaranty Company, obtained by the said defendant, Oscar G. Taylor, in a suit brought by the said defendant, Oscar G. Taylor, against the said Saint Louis & San Francisco Railroad Company, for damages for said personal injuries caused by the derailment of said car on December 8, 1909, as above set forth, in the State Circuit Court of Monroe County, Mississippi, in which suit judgment was rendered for the defendant, Oscar G. Taylor, for the sum of Four Thousand Dollars ($4,000.00), from which judgment the Railroad Company appealed the case to the Mississippi Supreme Court where the said judgment was affirmed.

80 It is further ordered, adjudged and decreed that the defendant, Oscar G. Taylor, be taxed with all costs of this suit.

It further appearing that the said Oscar G. Taylor has filed his petition for appeal, and filed his bond for appeal, and that the same have been granted, it is further ordered that the terms of this decree be held in abeyance until this cause is finally determined on appeal.

Ordered, adjudged and decreed this the 26th day of April, 1917.

H. C. NILES,
Judge.

Indorsed: Final decree,—perpetuating injunction, and requiring specific performanse, and taxing defendant with all costs. Filed April 26, 1917.

Agreement of Counsel as to Præcipe, etc.

In the District Court of the United States for the Eastern Division of the Northern District of the State of Miss.

In Equity. No. 158.

WELLS FARGO & COMPANY

vs.

O. G. TAYLOR.

We, the undersigned attorneys, representing the Appellee, the Wells Fargo & Co., acknowledge to have received a copy of the Præcipe filed in this cause by the attorneys for the Appellant and we hereby approve the same and agree that it contains all necessary papers; and we agree that a copy of the stenographers' notes may be embodied as part of this record and ask the Clerk to prepare the record in accordance with the præcipe of Appellant. We hereby waive the necessity of submitting the same to the Judge of this Court and any other formality in connection with said præcipe.

81 Witness our signatures, this 17th day of May, 1917.

SYKES & SYKES,
By J. A. S.,
Attorneys for Appellee.

Indorsed: Agreement of cousel for appellee as to receipt of copy of præcipe and to its correctness, etc. Filed May 21, 1917.

In the District Court of the United States for the Eastern Division of the Northern District of Mississippi.

In Equity. No. 158.

WELLS FARGO & COMPANY

vs.

OSCAR G. TAYLOR.

Now comes the said Wells Fargo & Company, Appellee, and waives the issuance and service on it of the Citation on the appeal by O. G. Taylor in the above styled cause. This waiver to be and have the same effect as if citation such as is required by law had been duly issued and served on Complainant this date.

Witness our signatures this the 12th day of May, 1917, Aberdeen, Miss.

SYKES & SYKES,
By E. O. SYKES,
Solicitors for Complainant.

Indorsed: Waiver of issuance and service of Citation of Appeal by Appellee's Counsel. Filed May 17, 1917.

82 In the United States District Court for the Eastern Division of the Northern District of Mississippi.

In Equity.

O. G. TAYLOR, Appellant,

vs.

WELLS FARGO & Co., Appellee.

To the Clerk of said court:

You are requested to make a transcript of the record in the above styled cause to be filed in the United States Circuit Court of Appeals for the 5th Circuit at New Orleans, La., pursuant to an appeal granted in the above styled cause on the 26th of April, 1917, and to include in such transcript of record the following copies of certain papers, etc., and no other papers:

1st. Organization of the Court and action of the Court at the October Term, 1916, in taking the cause under advisement to be decided in vacation.

2nd. The Assignment of Errors.

3rd. The Order allowing Appeal, Petition for the Appeal and the Bond.

4th. The original and supplemental bills and exhibits thereto

5th. Petition for Temporary Injunction.

6th. Order granting Temporary Injunction.

7th. Temporary Injunction.

8th. Answer of Respondent to the Original and Supplemental bills, filed June 28th, 1913.

9th. Motion of the Respondent, after the reversal of this cause by the Circuit Court of Appeals, to dismiss the bills, dissolve the injunction and tax Complainant with the costs, filed on May 24th 1915.

83 10th. Motion of Complainant to amend the bills, filed June 26th, 1915.

11th. Decree overruling motion to dismiss the bills, etc.

12th. Decree allowing Complainant to amend bills.

13th. Amendments to Original Bill, filed Sept. 27, 1916.

14th. Answer of Respondent to amended bill, filed Sept. 27th 1916.

14½. Agreement of Counsel as to introduction of certain papers

15th. Narrative statement of testimony introduced and exhibits

16th. Opinion of the Court on Motion of Appellant made at the trial of the cause to dismiss the bill and dissolve the injunction, etc.

17th. Final Decree.

18th. Agreement of counsel for Appellee that the Præcipe is correct and waiver of service of copy of the same.
19th. Waiver of citation of Appeal.
20th. Præcipe of Transcript.
21st. Certificate of Clerk.
You will file said Transcript with the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, La.
This the 26th day of April, 1917.

PAINE & PAINE,
Counsel for Appellant.

Indorsed: Præcipe to Clerk. Filed May 21, 1917.

84 UNITED STATES OF AMERICA,
Northern District of Mississippi,
Eastern Division:

In Equity. No. 158.

WELLS FARGO & COMPANY

vs.

OSCAR G. TAYLOR

I, Lemuel E. Oldham, Clerk of the District Court of the United States within and for the Eastern Division of the Northern District of Mississippi, do hereby certify that the foregoing typewritten pages, numbered from one (1) to ninety-seven (97), both inclusive, is a full, true, complete and correct transcript of the record and proceedings in the above entitled cause, except such papers as are omitted by direction of Counsel, as the same remains of record and on file in my office at Aberdeen, Mississippi.

In Testimony Whereof, I hereunto affix my signature and the official seal of said United States District Court at Aberdeen, in said Division and District, on this the 12th day of June, A. D. 1917.

LEMUEL E. OLDHAM,
Clerk as Aforesaid.
By R. D. CRENSHAW,
Deputy Clerk.

85 That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of December 17th, 1917.

No. 3102.

OSCAR G. TAYLOR

versus

WELLS FARGO & COMPANY.

On this day this cause was called, and, after argument by Thomas Fite Paine, Esq., for appellant, and E. O. Sykes, Esq., for appellee, was submitted to the Court.

86 *Opinion of the Court.*

Filed February 28th, 1918.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3102.

OSCAR G. TAYLOR, Appellant,

vs.

WELLS FARGO & COMPANY, Appellee.

Appeal from the District Court of the United States for the Northern District of Mississippi.

Thomas Fite Paine (Paine & Paine on brief) for Appellant.
E. O. Sykes (E. O. & J. A. Sykes and Branch P. Kerfoot, on brief) for Appellee.

Before Walker and Batts, Circuit Judges, and Evans, District Judge.

BATTS, *Circuit Judge:*

A contract between the St. Louis & San Francisco Railroad Company and Wells Fargo & Company, providing for the operations of the Express Company over the lines of the Railroad Company, contained a provision to this effect: The Express Company agrees "that it will and does hereby assume all risks and damage to its agents and employees while engaged in its business on any of the railways or property of the Railroad Company, and hereby agrees to indemnify and hold harmless the St. Louis & San Francisco Railroad
87 Company on account for all claims for damages suffered by the agents and employees of the Express Company, while en-

gaged in its business on any of the railways or property of the Railroad Company." An instrument introduced in evidence, marked "Messenger's Agreement", and reciting that it was an agreement between Wells Fargo & Company and Taylor, the plaintiff in error, but signed alone by the latter contains a provision to the effect "that neither the party of the first part (Wells Fargo & Company) nor any railroad or steamboat company, or other carrier, on whose lines said party of the second part may travel as such messenger or guard, shall, under any circumstances, or in any case whatever, be liable for any injury occuring to said party of the second part, while so traveling, whether such injury arises from any fault, carelessness or negligence, gross or otherwise, on the part of said railroad or steamboat company, or other carrier, its agents or servants; it being the intent of this contract that said party of the second part shall and will assume all and every risk incident to said employment, from whatever cause arising."

Taylor, having been injured while discharging his duties as an express messenger, in an accident on the St. Louis & San Francisco Railroad, instituted suit against the Railroad Company in a state court of Mississippi. The Express Company filed a petition in that court, setting out the contracts, and asked to be made a party defendant, in order that it might remove the case to the Federal Court. The prayer of the petition was refused. It thereupon instituted a
88 suit against appellant in the District Court of the United States, setting up the facts with reference to the agreements, and other facts; and, in addition to the prayer for general relief, asked for a temporary injunction, which was refused. The case in the state court proceeded to trial, resulting in a judgment for $4,000.00 for the plaintiff, which was affirmed by the Supreme Court of that State. Upon trial of the suit instituted by the Express Company a judgment was rendered for the Company. An appeal to this Court resulted in a reversal, the judgment being based upon the insufficiency of the pleadings, (220 Fed. 796). The bill was amended, and, upon a new trial, judgment was again for the Express Company, and the collection of the judgment rendered in the state court was enjoined. From that judgment this appeal is taken.

Appellant contends that the former judgment in this Court was final, and that this Court, not having permitted an amendment, the bill could not be amended below; that the suit was in violation of section 720 of the Judicial Code; that the contracts between the Express Company and the express messenger, and between the Express Company and the Railroad Company, whereby the Railroad Company was to be relieved from the effect of negligence, were void; and that, by virtue of section 5 of the second Employers' Liability Act (35 Stat. 65, c. 149, and the amendment of April 5th, 1910,—36 Stat. 291, c. 143) the contract between the Express Company and the appellant is void. If the last mentioned contention of appellant is meritorious it will not be necessary to consider the other questions.

The Employers' Liability Act provides: "Every common carrier

by railroad, while engaged in commerce between any of the
89 several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * *." Section 5 provides: "That any contract, rule, regulation or device whatsoever, the purpose or intent of which be to enable any common corrier to exempt itself from any liability created by this Act, shall, to that extent, be void."

If the terms of the Act apply to express companies, the contract between Wells Fargo & Company and the messenger is void. Second Employers' Liability Cases, 223 U. S., 1; Phila. Balt. & Wash. R. R. vs. Schubert, 224 U. S., 603.

An express company is a common carrier. Bank of Kentucky vs. Adams Express Co., 93 U. S. p. 174. An express company is a common carrier by railroad. If this fact were not universally known, it would be sufficiently indicated by the contract between the appellee and the St. Louis & San Francisco Railroad Co. It is not seen how an insistence to the contrary can be made. Indeed, there is no contention that the Express Company is not a common carrier by railroad; but the proposition is that, notwithstanding the language, the Act does not apply to express companies. The argument seems to be based upon rulings to the effect that the original Interstate Commerce Act was not applicable to express companies, and upon the case of Robinson vs. B. & O. R. R. Co., 237 U. S., 84, which holds that an employee of the Pullman Company is not an employee of the railroad company.

The Interstate Commerce Commission, in the Matter of the Express Companies, 1 Interstate Com. Reps., p. 347, held that the original Interstate Commerce Act was not intended to apply to
90 express companies. The language of that Act was to the effect: "That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water". In reaching a conclusion that the express companies were not included an unconvincing argument was based upon the use of the word "wholly". The Commission says: "The use of that word in the section which was evidently framed with the greatest care, affords a fair foundation for the claim that the Act does not describe the modes of transportation employed by express companies with sufficient precision to bring them within its terms". The proposition which seems to have been most meritorious in reaching the conclusion was "that the details of the law in its various provisions are so framed as to apply distinctly to railroads and railroad companies, and that they do not apply to the carriage of property by express companies without various implications and eliminations which give a somewhat strained construction to the language used." A number of examples are then given in support of this proposition. The Commission finally suggests "in case of doubtful jurisdiction, it is far better that the legislative body should resolve the doubt". This holding of the Interstate Commerce Commission was not more than acquiesced in by the courts (Am. Ex. Co vs. U. S., 212 U. S., 522). It is to be observed that the language of the Act which was under construction is

very different from that employed in the Employers' Liability Act. Even if the processes of reasoning were entitled to greater respect, the decision would not be held applicable to the present case.

91 Robinson vs. Baltimore & Ohio R. R. Co. is cited by appellee as decisive of the proposition that the Employers' Liability Act does not apply to an express company and its employees. That was a suit instituted by a Pullman porter, injured while performing his duties, against the railroad company. The Supreme Court says: "The inquiry is whether the plaintiff comes within the statutory description, that is, whether, upon the facts disclosed in the record, it can be said that, within the sense of the Act, the plaintiff was an employee of the railroad company, or whether he is not to be regarded as outside that description, being in truth on the train simply in the character of the servant of another master, by whom he was hired, directed and paid, and whose will he was to be continued in service or discharged." The Court continues: "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee"; and concludes: "We conclude that the plaintiff in error was not an employee of the defendant company within the meaning of the Employers' Liability Act, and that the judgment must be affirmed." A ruling that a porter, hired by the Pullman Company, is not a railroad company employee, is not conclusive that a messenger, hired by an express company, is not an express company employee.

It would not be difficult to make a fairly satisfactory argument to the effect that an express messenger is an employee both of the express company and of the railroad company. In the case of B. & O. R. R. Co. vs. Voight, 176 U. S. 498 (decided before the passage of the Employers' Liability Acts) recovery was refused an em-

92 ployee of the express company, in a suit against the railroad company, the Court in argument suggesting that the relation between the Express Company and the express messenger more nearly resembled that of an employee than a passenger, since "his position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business", and that the express messenger could not recover for the negligence of a fellow servant.

The relations between an express company and a railroad company have the elements of a partnership, of agency, of a common enterprise. Oliver vs. Northern Pacs. R. R. Co., 196 Fed., 432. It is not necessary, however, to determine whether appellant could have recovery against the Railroad Company under the Act or otherwise.

The issue necessary to be determined is whether the 5th section of the Employers' Liability Act renders void so much of the contract between the messenger and the express company as undertakes to negative the right of the messenger to recover for injuries. This answer is dependent upon whether the Act applies to express companies. The language of the Act does not see to leave any ground for construction or interpretation. It is perfectly

clear and absolutely unequivocal. The terms of the Act apply to every common carrier by railroad. The circumstances that the common carrier may also conduct a business other than by railroad cannot destroy the fact that it conducts a common carrier's business by railroad. If the fact that an express company may also be a common carrier by water, or by stage, could destroy the applica-
93 bility of the Act, railroad companies that utilize water transportation would also be exempt.

The transportation which is conducted on a railroad by an express company is properly within the function of the railroad. All of the handling of freight by express companies could be by railroad companies, and shippers could compel the acceptance by railroad companies of such freight. The arrangement between railroad companies and express companies by which they co-operate in handling part of the freight which railroad companies are compelled to carry, is regarded as legal. There would be nothing to prevent a railroad company from making somewhat similar arrangements with express companies or freight lines, by which the balance of its freight might be handled by intermediary transportation companies. It could, doubtless, in the same way farm out its passenger transportation business. The exercise, with regard to the balance of its business, of the rights which it has exercised with reference to that portion of it which has gone to the express companies, would dispense with a very large per cent of all of the direct employees of the railroad company. The arrangement would, in very large measure, nullify the Employers' Liability Act, if it is limited in its application as contended by appellee.

It was the purpose of the Congress to provide special protection to persons subject to the hazards incident to the operation of railroads. There could have been no reason for giving the protection to a railroad conductor, and refusing it to an express messenger. It will not be assumed that Congress intended to make a distinc-
94 tion in the absence of language that would so indicate. It will certainly not be assumed in the face of language which is clear and unambiguous.

Those of the decisions which seem to sustain the right of a railroad company and an express company, between them, to contract away the right of a human being to protection against negligence are entirely out of harmony with fundamental principles of right and the ordinary conceptions of law. No court ought at this time, in the face of the unequivocal language of the Congress, to make a ruling which would differentiate express company messengers, not alone from other persons engaged in the hazards of railroading, but from all other persons engaged in hazardous businesses. The Employers' Liability Act is proof that Congress was not unresponsive to the universal feeling that every business should carry its hazards. It will not be assumed that language, which is properly and logically comprehensive, is to be so construed as to exclude a class dependent on legislation even for protection against negligence.

Appellant is not seeking relief under the terms of the Employers'

Liability Act, but he is insisting that that part of the contract which the Express Company claims deprived him of all protection, is void. We so hold.

The judgment of the lower court is reversed and the cause remanded with directions to dismiss.

Reversed.

(Original Filed February 28th, 1918.)

95 *Judgment.*

Extract from the Minutes of February 28th, 1918.

No. 3102.

OSCAR G. TAYLOR

versus

WELLS FARGO & COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby reversed; and that this cause be, and it is hereby remanded to the said District Court with directions to dismiss;

It further ordered, adjudged and decreed that the appellee, Wells Fargo & Company, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

96 *Petition for Rehearing.*

Filed March 19th, 1918.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3102.

OSCAR G. TAYLOR, Appellant,

versus

WELLS, FARGO & COMPANY, Appellee.

Petition for Rehearing by Appellee, Wells, Fargo & Company.

Appeal from the District Court of the United States for the Northern District of Mississippi.

The appellee, Wells, Fargo & Company, in the above entitled cause, petitions the Court for a rehearing after judgment in said cause;

Or, should this honorable Court deny this petition, then appellee would respectfully petition that this Court certify the cause to the United States Supreme Court, because of the importance of this decision in construing the Employer's Liability Act; and, because there is a direct conflict in the decision of this Court and at least that of one State Court, viz.: that of New Jersey, in the case of Higgins v. Erie Railroad Company, 99 Atl., 98.

We ask for a rehearing for the following reasons:

97 First.

Conceding the correctness of the opinion for the purpose of this ground, viz.: that appellee is a Common Carrier by Railroad, under the Employers' Liability Act, yet appellee cannot be held liable in this case, for the reason that the liability appellee seeks to avoid is not created by this Act.

Section 5 of the Act provides: "That any contract * * * the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void."

The record in the case shows that the liability in question here is the liability only of the Railroad Company. No suit was ever filed against the Express Company arising from the injury. The case of Robinson v. Railway Company, 237 U. S. 84, we submit, is express authority for the statement that the Railroad Company could not be held liable in this case in the Federal Courts. The same case is also express authority for the statement that the appellant here was not an employee of the Railroad Company; and, further, that, under the contracts here in question, this is not a

case of co-proprietorship, as in the Oliver Case. The Voight Case is express authority for the statement that appellant here was not a passenger. In the Voight Case, by dictum it was intimated that the relationship more nearly resembled that of employer and employee; but the Robinson Case expressly holds, after referring to the Voight Case, that this relationship is not one of employer and employee. Next-to-the-last paragraph of the able opinion of this learned Court states the following:

"Appellant is not seeking relief under the terms of the Employers' Liability Act, but he is insisting that that part of the contract which the Express Company claims deprives him of protection, is void. We so hold."

98 The record in the case shows that appellant did not attempt to hold the Railroad Company liable under the Federal Employers' Liability Act.

In appellant's brief on the first appeal of this case, No. 2716, on page 6 of same, we find the following statement: "Appellant recognizes the fact that, to reverse this case, he must prove three things:" The third one is as follows: "That appellant was injured by appellee or its officers, its agents or employees, as set out in section 1 of the Employers' Liability Act of 1908."

It is manifest that appellant was not injured by any negligence on the part of the appellee, or an employee or agent of appellee, in the conventional use of the words, "agent" and "employee." The Employers' Liability Act uses the words, "officers, agents, or employees of such carrier." It is to be borne in mind, as stated in the opinion in the Robinson Case: "Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." Applying this same language to the other words of the Act, viz., "officers and agents," it is evident that Congress used the words "officers and agents" in their natural sense, and intended to describe the conventional relation of employers and employees to these agents and officers of the employed. The Bank of Kentucky Case, 93 U. S. 174, after deciding that an Express Company was a common carrier of packages intrusted to it, and stood in that relation to the consignor and consignee, and having the relationship of a common carrier in view, held, that so far as the shipper or consignee was concerned, the railroad company over whose line the messenger was traveling with the express matter, was the agent or employee of the Express Company. The distinction between that case and the instant case is, that neither the express company nor the railroad company was a common carrier of appellant. The express company was no carrier of him at all. The railroad company carried him by virtue of its contract with the express

99 company and the express company's contract with Taylor. Taylor being expressly informed in his contract of the other contract. It has been expressly decided that railroad companies are not common carriers of express carriers. Express Cases, 117 U. S. 1.

Since they are not common carriers of express carriers, then

certainly they are not common carriers of express messengers. This is, of course, with reference to the express company and the express messenger, but not to third parties or to strangers to these contracts, as was the Bank of Kentucky Case.

We, therefore, submit, that under the terms of this Act, the Railroad Company, whose negligence is complained of, was neither an officer, agent, or employee of the express company, so far as appellant is concerned, and, therefore, that the liability in question here, whether it be treated as the liability of the Railroad Company or as the liability of the Express Company, was not created by this Act.

So far as appellant, appellee, or the Railroad Company are here concerned, the Railroad Company was an independent contractor for the carriage of the express matter and express messenger.

"Stated as a general proposition, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor."—14 R. C. L., p. 67.

The above, we submit, is the general rule and clearly states the distinction between an independent contractor and an employee, agent, or servant.

I am the employer of a plantation manager. I purchase for him a ticket over the Mobile & Ohio Railroad Company, from Aberdeen, Mississippi, to St. Louis. I give him this ticket and send him to St. Louis to purchase mules for me. In transit, because of the negligence of the railroad company, the train is derailed and my employee injured. Certainly I am not responsible for the negligence of the railroad company. In legal aspects that case is similar to this on the question of agency and employee. The railroad company was neither my agent nor my employee, in the sense of making me liable for its negligence. The Robinson Case says that these terms are used in their natural sense. We, therefore, submit, that for a complete discussion of this question, this petition for rehearing should be granted.

100

Second.

Because of the importance of the question involved, and because of the fact that there were so many other questions involved in this appeal, on the oral argument it was impossible, within the time allowed, to discuss fully the question of whether or not an express company is a common carrier by railroad, within the terms of this Act. Under the rules of the Court, we are not permitted to go very fully into the question. We make the following brief suggestions, however:

Section 1 speaks of defects in cars, engines, appliances, machinery, track or railroad bed, etc., showing that the Act was directed at railroad companies. The debates in Congress over this Second Employers' Liability Bill show that the senators and members of Congress thought that it only applied to railroad companies. See remarks of Senator Dolliver, 5th Cong. Record. 1st Session, 60th Congress, p. 4527. See, also, Report of the Committee, extensively

quoted from in our brief on the first appeal. A thorough examination of the Mondou Case (Second Employers' Liability Cases, 223 U. S. 1), we submit, clearly indicates that the Supreme Court meant to confine it to railroad companies.

The express business is commonly recognized and understood to be one of the most important of an interstate nature. We submit that whenever Congress has desired to legislate about express companies, it has always used the specific term, "express companies;" that whenever it has desired to legislate about railroad com-
101 panies, it has generally used the term, "common carrier by railroad," or some like character. The interpretation put on the Interstate Commerce Act by the Commerce Court, and later followed by the United States Supreme Court in 212 U. S., was understood and practically read into the subsequent legislation of Congress; and whenever Congress wanted to include Express Companies, Pullman-Car Companies, or Telegraph Companies, within the terms of an Act, it has done so by using the above specific terms. The term, "common carrier by railroad," does not describe an express company. The decision of the Commerce Court, above referred to, has been followed in all the State and Federal Cases that have come under our observation, with probably one exception. We, therefore, respectfully submit that, on account of the great importance of this question, the Court should grant this petition for a re-argument, allowing us to discuss simply the questions here raised. There are many decisions of inferior Federal Courts and the courts of last resort of states, to which we would like to call the attention of the Court on a rehearing.

We would further ask the Court, if it should overrule this Petition for a Rehearing, then, that it certify the questions here discussed to the United States Supreme Court for the following reasons: First, because the Court is construing a very important Act of Congress, and it is of general importance to the express companies and their employees to know whether or not an express company is a common carrier by railroad, under the provisions of this Act. Second, because there is a direct conflict in the construction of this Act by this honorable Court and that of the State Court of New Jersey, and, perhaps, other State Courts, probably
102 Illinois for one. We would refer the Court to the dissenting opinion of Mr Justice Pardee in the decision of this case on the first appeal, No. 2716, as also showing reasons why the case should be certified to the Supreme Court.

Respectfully submitted,

WELLS, FARGO & COMPANY,
By E. O. SYKES,
Its Solicitor of Record.

MR. BRANCH P. KERFOOT,
Of Counsel.

I hereby certify that, as solicitor for appellee, the petition for a rehearing, above set out, is meritorious, and, in my opinion, the grounds of said petition are true in point of fact, as well as in

law, and require a rehearing of the case, and that there should be an affirmance of the decree of the Court below in said cause.

Respectfully submitted,

E. O. SYKES,
Solicitor for Appellee.

103 *Order Denying Rehearing.*

Extract from the Minutes of April 15, 1918.

No. 3102.

OSCAR G. TAYLOR,

versus

WELLS FARGO & COMPANY.

Ordered that the petition for rehearing, filed in this cause, be, and the same is hereby, denied.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, de hereby certify that the pages numbered from 85 to 103 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and
104 proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3102, wherein Oscar G. Taylor is appellant, and Wells Fargo & Company are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 84 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 30th day of April, A. D. 1918.

[Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

105 In the United States Circuit Court of Appeals, for the Fifth Circuit.

No. 3102.

OSCAR G. TAYLOR, Appellant,

versus

WELLS FARGO & COMPANY, Appellee.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of Certiorari, I now hereby certify, that on the tenth day of July, A. D. 1918, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:—

"United States Circuit Court of Appeals, Fifth Circuit.

OSCAR G. TAYLOR, Appellant,

vs.

WELLS FARGO & COMPANY, Appellee.

Stipulation.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the certified transcript of the record in the above entitled case, heretofore filed with the Clerk of the Supreme Court of the United States, be taken as a return to the writ of certiorari issued herein by the Supreme Court of the United States under date of June Sixteenth, One Thousand nine hundred and eighteen.

Dated June —, 1918.

(Signed) PAINE & PAINE,
Attorneys for Appellee."

(Signed) CHAS. W. STOCKTON,
BRANCH P. KERFOOT,
E. O. SYKES,
Attorneys for Appellee."

I further certify that the above is a true and correct copy of said stipulation, and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix

the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 15th day of July, A. D. 1918.

[Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

106 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Oscar G. Taylor is appellant, and Wells Fargo & Company is appellee, No. 3102, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of Mississippi, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
107 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of June, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

108 [Endorsed:] File No. 26,509. Supreme Court of the United States, No. 1042, October Term, 1917. Wells Fargo & Company vs. Oscar G. Taylor. Writ of Certiorari. Filed 1st day of July, 1918. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

109 [Endorsed:] 448—26509. No. 3102. United States Circuit Court of Appeals for the Fifth Circuit. Oscar G. Taylor, Appellant, vs. Wells Fargo & Company, Appellee. Writ of Certiorari, and return thereto.

110 [Endorsed:] File No. 26509. Supreme Court U. S. October Term, 1918. Term No. 448. Wells Fargo & Co., petitioner, vs. Oscar G. Taylor. Writ of certiorari, and return. Filed July 18, 1918.

No. 10[redacted]

Supreme Court of the United States.

WELLS FARGO & COMPANY,

Petitioner,

against

OSCAR G. TAYLOR,

Respondent.

PETITION, NOTICE OF MOTION AND BRIEF FOR WRIT OF CERTIORARI.

BRANCH P. KERFOOT,
Attorney for Petitioner.

B. O. SYKES,
J. A. SYKES,
CHAS. W. STOCKTON,
Of Counsel.

[redacted] Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

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United States Supreme Court.

In the Matter of the Petition of
WELLS FARGO & COMPANY,
Petitioner,

AGAINST

OSCAR G. TAYLOR,
Respondent.

For a Writ of Certiorari, directed to the Circuit Court of Appeals, for the Fifth Circuit, to bring before the Supreme Court the case of OSCAR G. TAYLOR, Appellant, ads. WELLS FARGO & COMPANY, Appellee.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows as follows:

I. That Petitioner at all times mentioned in the complaint herein was and still is a corporation, organized by a law of Colorado and thereby authorized to do a general express business in the

United States of America, and as an incident to said business, authorized to make contracts with railroads and other common carriers to carry its express and its employes, who have custody of said express matter, and to make contracts with persons who accompany and care for said express on common carriers (R. 9).

II. That on February 10th, 1906, petitioner made a contract with the St. Louis and San Francisco Railroad Company for the carrying of its express and express messengers on the passenger trains of said railroad. Under this contract, respondent was given the sole privilege of having its express and messengers so carried, to the exclusion of all other express companies. For this privilege respondent agreed to pay the said railroad company fifty-five per cent. of its gross earnings, and further agreed to "assume all risk and damage to its agents and employes while engaged in its business on any of the railways or property of the railroad company; and hereby agrees to indemnify and hold harmless the St. Louis and San Francisco Railroad Company, on account of all claims for damage suffered by the agents and employes of the express company while engaged in its business on any of the Railways or property of the railroad company" (R. 9, and Exhibit "A" of Bill, R. 20).

III. That on said date and thereafter to and including December 8th, 1909, the said St. Louis and San Francisco Railroad Company owned and operated a branch line from Aberdeen to Amory, both towns in Mississippi, and transported the express shipments of the petitioner over this line, by virtue of the above mentioned contract.

IV. That on the 20th day of April, 1909, Respondent entered into a written contract or agreement with Petitioner (called Messenger's Agreement and set forth as Exhibit B to the Bill herein) by which Respondent became the express messenger who accompanied and had charge of the express of the petitioner on the passenger trains between the towns of Aberdeen and Amory, Mississippi (R. 23, 58, 65).

This agreement recites that the petitioner neither owns, controls, manages nor in any way directs or operates any railroad, steamboat or other company, but relies upon railroads and other methods of transportation managed by other corporations for the transportation of its packages, and that it is necessary for Petitioner to have guards and messengers accompany this express on the cars and that the railroad and other companies will not allow these employes of Petitioner to accompany this matter (R. 23) "except upon the agreement that said party of the first part [Petitioner] will hold them harmless for any or all

liability for injuries which such employes of the party of the first part may receive while accompanying said goods, etc.; and whereas the party of the second part, with full knowledge of all the foregoing facts, is desirous of entering the employment of the party of the first part as one of such messengers or guards as aforesaid, and whereas the party of the first part declines to employ the party of the second part, except upon the conditions that this agreement shall be duly executed and delivered by the party of the second part" (R. 24).

> "Now in consideration . . . it is agreed that neither party of the first part nor any railroad company . . . on whose lines party of the second part may travel as such messenger or guard, shall, under any circumstances, or in any case whatever, be liable for any injury occurring to said party of the second part, while so traveling, whether such injury arises from any fault, carelessness or negligence, gross or otherwise, on the part of said railroad . . ., itself or their agents or servants; it being the intent of this contract that said party of the second part shall and will assume all and every risk incident to said employment from whatever cause arising" (R. 24, 25).

And it was further agreed that said contract should extend to and inure to the benefit of the railroad company (R. 25).

V. That on December 8th, 1909, while Respondent was riding on the cars of the said railroad company, in charge of the interstate express shipments of Petitioner (R. 66), said cars were derailed, and the express car in which said Taylor was riding by virtue of the above mentioned contract, was thrown to the ground and Respondent sustained certain personal injuries to his body.

VI. That on or about February 10th, 1910, Respondent filed suit in the State Circuit Court of Monroe County, Mississippi, against the St. Louis and San Francisco Railroad Company, for the sum of $20,000.00 damages for personal injuries sustained as above set forth. Petitioner was not made a party to said suit (R. 73).

VII. That on or about March 14th, 1910, this Petitioner filed a petition in said State Circuit Court of Monroe County, Mississippi, setting out its contracts with appellant and the railroad company, and stated that it was the real party in interest and asked that it be made a party defendant, so that it could remove the case to the Federal Court. The defendant railroad company at the same time filed a motion in said cause, asking that the plaintiff be required to make this petitioner a party defendant (R. 12, 73, 74).

The petitioner's and the railroad company's said motions were overruled, and this petitioner

was not allowed to become a party to the suit in the State Court (R. 12).

VIII. That on May 2nd, 1910, this petitioner filed an original bill in equity, in the Federal District Court for the Northern District of Mississippi, which court had jurisdiction, because of the diversity of citizenship of the plaintiff and of the defendant, and in said bill set up the above facts, making the said contract with the railroad company "Exhibit A" to its bill and the contract or agreement with said Taylor "Exhibit B" to its bill. Said bill further alleged the insolvency of said Taylor and that irreparable injury would result to this Petitioner if he were allowed to proceed with his suit in the State Court (R. 9–25).

In addition to the prayer for general relief, said bill prayed that a restraining order or temporary injunction be issued, restraining said Taylor from prosecuting his suit in the State Court until this one had been heard on its merits, and that on final hearing, said Taylor be required to execute and deliver to the railroad company a valid release of his claim for damages for personal injuries, and that said injunction be made perpetual. The restraining order so prayed for was denied.

IX. That on July 12th, 1910, the said case in the State Court was tried and resulted in a judgment for $4,000.00 in favor of the plaintiff and

against said railroad company. From such judgment said railroad company duly prosecuted an appeal to the State Supreme Court (R. 29, 74).

X. That on September 3rd, 1910, this petitioner filed a supplemental bill in this cause, setting out the verdict and judgment in the State Court and repeated in substance its prayer for relief as contained in the original bill, and again asked for a restraining order or temporary injunction (R. 26–30).

That on May 19th, 1910, said Taylor filed a demurrer to the original bill and on October 3rd, 1910, filed a demurrer to the supplemental bill.

XI. That on September 27th, 1910, this petitioner filed a petition thereon for a temporary injunction (R. 31). That on October 3rd, 1910, said Taylor filed an answer to said motion. This motion was argued and taken under advisement by the court. While so pending and on July 9th, 1912, the State Supreme Court of Mississippi affirmed the judgment in the Circuit Court of said state for $4,000.00. in favor of said Taylor and against the St. Louis and San Francisco Railroad Company.

XII. That on July 15th, 1912, this petitioner's motion for a temporary injunction restraining said Taylor from attempting to collect his said judgment was granted (R. 32, 33).

Thereafter, the supplemental bill having been amended (R. 46–49), the demurrers to the original and supplemental bills were argued. Thereafter on June 11th, 1913, said demurrers were overruled by the court (R. 44).

XIII. That on June 28th, 1913, said Taylor filed his answer to said original and supplemental bills. He denied that he had signed the Messengers' Agreement and alleged that the contracts between this Petitioner and said Taylor were and are in violation of the Federal Employers' Liability Act and are, therefore, null and void; that this petitioner was a common carrier by railroad, engaged in interstate commerce at the time he was hurt; that the railroad company was the agent or employe of the express company at that time, and he denied that the prosecution of the suit in the State Court was a violation of his contract (R. 49–53).

XIV. At the regular April term, 1914, of the court held at Aberdeen, Mississippi, this case was heard upon original and supplemental bills and exhibits, answer of defendant and oral testimony.

XV. That on September 22nd, 1914, the court delivered a written opinion, holding this petitioner was entitled to this relief prayed for in his said bills, and on October 2nd, 1914, a final decree was rendered in this case in favor of this petitioner.

From this decree an appeal was taken to the Circuit Court of Appeals for the Fifth Circuit. On such appeal the said Court of Appeals reversed the decree of the lower court and remanded the case, holding that this petitioner had failed to show that it was entitled to the relief prayed for, in that it had not stated that said Taylor was not a joint employe of the railroad and of the express company or was not in the employ of the railroad company at the time he was injured; or in other words, holding that the bills were insufficient. A petition for reargument was thereupon filed by this petitioner, in which petition, after asking for a rehearing, said appellant asked the court to certify the cause to this court, or that it modify its decree so that it would expressly authorize the District Court to allow appellant to amend its original bill in uniformity with such opinion. This petition was denied.

XVI. When the case was remanded to the District Court, said Taylor filed a motion for a decree, dismissing the bill. This motion was denied.

This petitioner then filed a motion to be allowed to amend the original and supplemental bill of the complaint. Such motion was sustained by the court and the bills were amended, by alleging that said Taylor was not in the employ of the railroad company at the time he was injured, that

the suit in the State Court of Mississippi prosecuted by said Taylor against the railroad company was not filed under the Federal Employer's Liability Act, and that there has never arisen any controversy as to whether or not Taylor was employed as a matter of fact by the railroad company, except the contention that the two contracts between the railroad and express companies, and between Taylor and the express company, constituted him such an employe.

XVII. An answer to this amended bill was filed by said Taylor and additional testimony was taken. The uncontradicted testimony showed that Taylor was not a joint employe of the express company and the railroad company. The final decree was then rendered by the District Court in favor of this petitioner, sustaining all the allegations of the bill (R. 78). This decree in part reads as follows:

> " . . . and it appearing to the Court
> " that all the allegations of the Original Bill,
> " and the amendments thereto, and the sup-
> " plemental bill, are true as therein stated,
> " and that the institution and prosecution of
> " the suit in the State Court of Mississippi
> " by the defendant, Oscar G. Taylor, against
> " the St. Louis and San Francisco Railroad
> " Company, was in direct violation of the
> " Messengers Agreement, a contract entered
> " into between the said Taylor and the Com-

" plainant, Wells Fargo & Company, and was " a fraud practised by the said Taylor upon " the complainant." . . .

XVIII. From this decree an appeal was taken to the Circuit Court of Appeals for the Fifth Circuit and on February 28th, 1918, said court handed down an opinion reversing the judgment of the lower court and remanding the cause, with directions to dismiss (R. 87).

XIX. That on March 19, 1918, a petition for a rehearing and a stay of the issuance of the mandate (R. 96) was filed by this Petitioner and thereafter and on April 15th, 1918, the petition for rehearing was denied (R. 103) and thereupon an order was entered that the mandate be stayed until May 20th, pending the filing with the United States Supreme Court by this petitioner of its petition for a writ of *certiorari*.

XX. The principal questions and propositions of law involved in the case are as follows:

(*a*) Does the Federal Employers' Liability Act, approved April 22nd, 1908 (358 Stat. at L., 65, Chapter 149), covering the liability of " every common carrier by railroad " apply to an express company, operating no railroad or trains but having its express matter and employes carried for it by the railroad for an agreed compensation?

(*b*) Do the agreement between a railroad company and Petitioner, as set forth in paragraph V

above and the agreement between petitioner and respondent, as set forth in paragraph VI above, constitute respondent an employee of said railroad company?

(*c*) Does Section 5 of the Federal Employers' Liability Act render the "Messenger's Agreement" herein void in all cases or merely void as a defense to an action based upon a "liability *created* by this Act"?

XXI. That concerning the effect of the Employers' Liability Act upon the contracts above recited, Judge Batts, in the opinion in the Circuit Court of Appeals below, said among other things:

> "The issue necessary to be determined is whether the Fifth Section of the Employers' Liability Act renders void so much of the contract between the messenger and the express company as undertakes to negative the right of the messenger to recover for injuries. *This answer is dependent upon whether the Act applies to express companies.* The language of the Act does not seem to leave any ground for construction or interpretation. It is perfectly clear and absolutely unequivocal that the terms of the Act apply to every common carrier by railroad . . ." (R. 92, 3).
>
> . . . . .
>
> "*Appellant is not seeking relief under the terms of the Employers' Liability Act,* but he is insisting that that part of the con-

tract which the Express Company claims deprived him of all protection, is void. We so hold."

"The judgment of the lower court is reversed and the cause remanded with directions to dismiss" (R. 94).

[Italics ours.]

XXII. That in Express Company *v.* United States, 212 U. S. 522, this court, in referring to the Act to Regulate Commerce, as originally passed in 1887, and by its terms applicable to "common carriers engaged in interstate commerce by railroad," said:

"As originally reported, this Act did not apply to express companies. The section was originally framed with the intention of making provisions for railroad carriers."

XXIII. That in Higgins *v.* Erie Railroad Company, 99 Atlantic 98, the Court of Errors and Appeals of New Jersey, in construing this same phrase of the Federal Employers' Liability Act, said:

"This action was instituted against the Erie Railroad Company and Wells Fargo & Company, to recover damages for the death of plaintiff's intestate. The liability of Wells Fargo & Company is rested on the Federal statute entitled 'an act relating to the liability of common carriers to their employes in certain cases, approved April 22nd, 1908, and that of the railroad company on the negligent operation of one of its engines." . . .

"The case of the defendant Wells Fargo & Company manifestly does not fall within the purview of the act of Congress relied upon by the plaintiff, *for it is not a common carrier 'by railroad'*, to which class of carriers alone the statute applies, and, therefore, as to this defendant the non-suit was correct."

[Italics ours.]

XXIV. And your Petitioner further avers that the present case is one in which it is proper for this court to issue a writ of *certiorari* for the following reasons, among others:

(*a*) Because this petitioner operating under this contract and under similar contracts with other railroad companies conducts an extensive express business in and through forty states of the United States and in its said business has not less than 16,000 employes and it together with other express companies operating under similar contracts with railroad companies conduct the express business of the United States and in said business have not less than 75,000 employes.

(*b*) Because the application and effect of the State Liability Statutes or State Compensation Statutes of at least thirty-five of the states in which these express companies conduct their express business depend directly upon whether the said Federal Employers' Liability Act does or does not embrace express companies within the designation "common carrier by railroad".

(*c*) Because there is a conflict between the Circuit Court of Appeals for the Fifth Circuit in its decision herein and the Court of Errors and Appeals of New Jersey, in the case of Higgins *v.* Erie Railroad Company above referred to.

(*d*) Because the Circuit Court of Appeals below has construed the Federal Employers' Liability Act incorrectly in holding

(1) that it applies to express companies;

(2) that it renders such assumption of risk void, in an action not based upon liability created by that act.

(*e*) Because the questions of law involved herein have not been passed upon by this Court.

(*f*) Because the public interest and the interests of jurisprudence require the decision of this Court upon the questions of law involved herein.

WHEREFORE, your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Fifth Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

WELLS FARGO & COMPANY,
By BRANCH P. KERFOOT,
Attorney for Petitioner.

E. O. SYKES,
J. A. SYKES,
CHAS. W. STOCKTON,
Of Counsel for Petitioner.

STATE OF NEW YORK,
County of New York,
Southern District of New York. } ss.

CHARLES H. GARDINER, being duly sworn says, he is the Secretary of Wells Fargo & Company, the petitioner herein; that he has read the foregoing petition and knows its contents; that the same is true to the best of his knowledge and belief; that his knowledge and belief are based upon the record in the case, his general knowledge of the affairs of the company and statements made to him by counsel in the case.

CHARLES H. GARDINER.

Sworn to before me this
9th day of May, 1918.

J. A. MCLAUGHLIN,
Notary Public,
New York County.

(SEAL)

CERTIFICATE OF COUNSEL.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded, and that the case is one in which the prayer of the Petitioner should be granted by this court.

BRANCH P. KERFOOT,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

In the Matter of the Petition of
WELLS FARGO & COMPANY,
Petitioner,

AGAINST

OSCAR G. TAYLOR,
Respondent.

For a Writ of Certiorari, directed to the Circuit Court of Appeals, for the Fifth Circuit, to bring before the Supreme Court the case of OSCAR G. TAYLOR, Appellant, ads. WELLS FARGO & COMPANY, Appellee.

SIRS:

Please take notice that upon a certified copy of the transcript of the record herein and upon the annexed petition of Wells Fargo & Company, verified the 9th day of May, 1918, I shall submit the motion hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on Monday, the 27th day of May, 1918, at the open-

ing of Court on that day or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dated, New York, May 9, 1918.

BRANCH P. KERFOOT,
Petitioner
Attorney for Appellee.

To MESSRS. PAINE & PAINE,
Attorneys for Respondent.

UNITED STATES SUPREME COURT.

In the Matter of the Petition of
WELLS FARGO & COMPANY,
Petitioner,

AGAINST

OSCAR G. TAYLOR,
Respondent.

For a Writ of Certiorari directed to the Circuit Court of Appeals, for the Fifth Circuit, to bring before the Supreme Court the case of OSCAR G. TAYLOR, Appellant, ads. WELLS FARGO & COMPANY, Appellee.

Now comes the petitioner above named, by Branch P. Kerfoot, its attorney, and moves this Court, upon a certified copy of the transcript of the record herein and upon the annexed petition, verified the 9th day of May, 1918, for a Writ of *Certiorari*, directed to the Circuit Court of Appeals for the Fifth Circuit and to the District Court for the Northern District of Mississippi, to bring before this Court the case of Oscar G. Taylor, Appellant, ads. Wells Fargo & Company, Appellee, recently decided by the Circuit Court

of Appeals, Fifth Circuit, and by the District Court for the Northern District of Mississippi, for such proceedings herein as to the Court may seem just; and for such other and further relief in the premises as may be just.

BRANCH P. KERFOOT,
Attorney for Petitioner.

E. O. SYKES,
J. A. SYKES,
CHAS. W. STOCKTON,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

WELLS FARGO & COMPANY,
Petitioner,
(Appellee below),

AGAINST

OSCAR G. TAYLOR,
Respondent,
(Appellant below).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The principal question in this case is whether the Federal Employers' Liability Act (approved April 22nd, 1908) does or does not apply to an express company, like this petitioner, which does not operate or direct any railroad or railroad trains, but which by virtue of a contract with a railroad company has its express matter transported for it over the lines and upon the trains of that railroad for an agreed compensation.

Pursuant to a contract with the St. Louis and San Francisco Railroad Company, in which as part consideration for the carriage of its express matter, the express company agreed to protect it from any claims for injuries to employes of the express company (R. 9, 14), this petitioner, on December 8th, 1909, sent certain interstate express shipments, in the custody of the respondent as its express messenger, between points on the line of said railroad. The train was wrecked and the messenger sustained personal injuries (R. 11). He sued the railroad company in the State Court (R. 73). The express company, after having tried unsuccessfully to have itself made a party to that action, began an equity suit in the Federal District Court for the Northern District of Mississippi, seeking to restrain temporarily and upon the final hearing therein to enjoin perpetually said Taylor from proceeding with said law suit against the St. Louis and San Francisco Railroad Company and for a decree that he specifically perform and carry out his agreement by which he had assumed all risk of his said employment and had agreed to hold harmless both the express company and the railroad company (R. 12, 9–25).

Both the contract between the railroad company and the express company and the "Messenger's Agreement" executed by said Taylor were set out at length as parts of the Bill in this

suit and are printed at pages 14 and 23, respectively, of the Record herewith submitted.

The motion for a restraining order was denied. Said Taylor, on July 12th, 1910, obtained judgment for $4,000.00 against the railroad company, and this fact was alleged herein by a Supplemental Bill (R. 29, 74).

Later, the State Supreme Court meantime having sustained said Taylor's judgment against the railroad company, a new motion for temporary injunction herein was granted (R. 32, 33).

The cause was heard at the April term, 1914, of the United States District Court, and on October 2nd, 1914, a final decree was rendered in favor of this petitioner and against said Taylor.

Taylor appealed to the Circuit Court of Appeals and the decree was reversed and the cause remanded, the court holding that the bill was insufficient, in that it failed to allege that said Taylor was not a joint employe of the railroad company and this petitioner, and was not in the employ of the railroad company at the time of his injury.

In the lower court the bill was amended accordingly and additional testimony was introduced by each party. Decision was rendered in favor of the appellee, sustaining all the allegations of the bill (R. p. 78). This decree in part reads as follows:

> . . . "and it appearing to the Court that all the allegations of the Original Bill,

> and the amendment thereto, and the supplemental bill, are true as therein stated, and that the institution and prosecution of the suit in the State Courts of Mississippi by the defendant, Oscar G. Taylor, against the St. Louis and San Francisco Railroad Company was in direct violation of the Messenger's agreement, a contract entered into between the said Taylor and the complainant Wells Fargo & Company, and was a fraud practised by the said Taylor upon the complainant"; . . .

From this decree also an appeal was taken by said Taylor and the Circuit Court of Appeals has now reversed that decree and holds that the "Messenger's Agreement" is made void by section five of the Federal Employers' Liability Act, approved April 22nd, 1908 (R. 87).

The ground of jurisdiction of the Federal Court in this suit was the diversity of citizenship between Wells Fargo & Company, a Colorado corporation, and said Taylor, a citizen of Mississippi (R. 9). The decree of the Circuit Court of Appeals is final and the matter can be brought to this court by writ of *certiorari*.

It is important that this question be determined by the United States Supreme Court, because the operations of this petitioner and similar express companies extend throughout the United States

and most of the states (to wit, at least 35) have local statutes fixing liability of express companies to their employes or providing for compensation by such employers to their employes for injuries received in the performance of their duties. As to all of these statutes, either by specific provisions to that effect or by operation of law, the extent to which they apply or are enforcible is dependent upon whether the federal act is or is not directed to the express companies. Accidents resulting in personal injuries to some of the thousands of express employes in this country are constantly occurring and resulting in proceedings before state compensation boards or suits in state or federal courts. Some of these state bodies have held that their acts apply because the federal act does not; others have held that the local acts do not apply because the federal act does and even the courts do not agree on this point.

POINTS AND AUTHORITIES.

I. THE QUESTION PRESENTED BY THIS PETITION IS ONE OF NATION-WIDE INTEREST.

II. THE PROPER INTERPRETATION AND THE ENFORCEMENT OF THE LIABILITY OR COMPENSATION STATUTES IN AT LEAST THIRTY-FIVE STATES ARE DEPENDENT UPON A PROPER AND FINAL ADJUDICATION OF THE QUESTION HERE PRESENTED.

III. THERE WILL BE A HOPELESS CONFLICT OF DECISIONS UNTIL THIS COURT DECIDES THE QUESTION HERE PRESENTED TO IT.

Higgins *v.* Erie Railroad Co., 99 Atlantic, 98.

IV. THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT APPLY TO EXPRESS COMPANIES.

In re Express Co., 1 I. C. C. 677.
United States *v.* Morsman, 42 Fed. 448.
Southern Ind. Exp. Co. *v.* U. S. Exp. Co., 88 *id.* 658.
Same case (in C. C. A.), 92 *id.* 1022.
Amer. Exp. Co. *v.* U. S., 212 U. S. 522.
Higgins *v.* Erie, *supra.*

V. THE EMPLOYERS' LIABILITY ACT, EVEN IF APPLICABLE TO EXPRESS COMPANIES, WOULD NOT RENDER VOID A RELEASE FROM LIABILITY NOT CREATED BY THAT ACT.

VI. THIS IS A PROPER CASE FOR THE EXERCISE OF THE COURT'S POWER TO ISSUE A WRIT OF CERTIORARI.

American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 279.
Lau Ow Bew, Petitioner, 141 U. S. 583.
Forsyth *v.* Hammond, 166 U. S. 506.
Montana Mining Co. *v.* St. Louis Mining Co., 204 U. S. 204.
Fields *v.* U. S., 205 U. S. 292.
St. L., K. C. & C. R. R. Co. *v.* Wabash, 217 U. S. 247.

ARGUMENT.

I.

THE QUESTION PRESENTED BY THIS PETITION IS ONE OF NATION-WIDE INTEREST.

Wells Fargo & Company conducts an express business in, between and through forty of the states of the United States and all of its express matter is moved for it by railroads under contracts similar to the one here in question. It does not operate, direct or control any railroads or trains. In the course of its said business and scattered through forty states it has over 16,000 employes. The other express companies have their express matter transported for them under

similar contracts and in the course of their business have many thousands of employes. The number of employes of the four larger express companies alone is about 75,000, to whom and to the shareholders of the said express companies, a correct and controlling decision of the question hereby presented is important.

II.

THE PROPER INTERPRETATION AND THE ENFORCEMENT OF THE LIABILITY OR COMPENSATION STATUTES IN AT LEAST THIRTY-FIVE STATES ARE DEPENDENT UPON A PROPER AND FINAL ADJUDICATION OF THE QUESTION HERE PRESENTED.

At least thirty-five of the states have their own statutes, prescribing and defining liability of employers to their employes within the state, in very much the same way that the Federal Statute here in question prescribes and defines the liability of the employers covered by it to their employes therein mentioned, or else have statutes providing for compensation to be paid by employers to employes injured in their service. A large number of these state statutes provide specifically that they shall not apply to employes engaged in interstate commerce, for whom a rule of liability is fixed by Congress. To those not

having this specific exception, the same exception applies as a matter of law.

In determining therefore whether a statute of any state applies to an employe of an express company, engaged in interstate commerce, it is first necessary to determine whether Congress has fixed for him a rule of liability by this act, *i. e.*, whether the Federal Act applies to express companies.

The State Boards charged with the administration of these statutes are not in accord on this point; some have held that the Federal Act does not apply to express companies and, therefore, the State Statute does; others have held that the Federal Act does apply to express companies, and, therefore, that the local statute does not.

III.

THERE WILL BE A HOPELESS CONFLICT OF DECISIONS UNTIL THIS COURT DECIDES THE QUESTION HERE PRESENTED TO IT.

In addition to the difference of opinion between the Boards charged with the administration of the State liability and compensation statutes, as above mentioned, a conflict between the courts has already begun and must continue and increase until a final and controlling decision is rendered. Such a decision can be rendered

by no court other than the United States Supreme Court.

The Court of Errors and Appeals of New Jersey, in Higgins *v.* Erie Railroad Company, 99 Atlantic, 98, was compelled to decide whether the Federal Employers' Liability Act did or did not apply to express companies. It had no difficulty in arriving at a decision that the express companies were not included within the act. Among other things that court said:

> . . . " This action was instituted against the Erie Railroad Company and Wells Fargo & Company, to recover damages for the death of plaintiff's intestate. The liability of Wells Fargo & Company is rested on the federal statute entitled ' an act relating to the liability of common carriers to their employes in certain cases ', approved April 22nd, 1908, and that of the railroad company on the negligent operation of one of its engines." . . .
>
> . . . " The case of the defendant Wells Fargo & Company manifestly does not fall within the purview of the act of Congress relied upon by the plaintiff, for it is not a common carrier ' by railroad ' to which class of carriers alone the statute applies, and therefore, as to this defendant, the nonsuit was correct." . . .

In direct conflict with this is the decision of the Circuit Court of Appeals for the Fifth Cir-

cuit in the case presented to this court by the petition herewith.

The fact that liability or compensation statutes are now in effect in so many of the states and the fact that most of such statutes have been enacted within the last few years, render it entirely probable that no small amount of litigation will result and that the courts in different jurisdictions, being called upon to pass upon this question, will not be in accord. As the amounts involved in these cases are frequently large, appeals may be expected in many of them, with the result that the courts of last resort in the states and the Circuit Courts of Appeals in the different circuits will not, for many years, if ever, find themselves in accord, unless guided to that end by a decision of this court.

In addition to the conflict above indicated, the Appellate Court below in this case seems to be in conflict with the Interstate Commerce Commission and with this Court itself, unless some distinction, not apparent to us, exists between the meaning of the words "common carrier by railroad", as used in this act, and the words "common carrier . . . wholly by railroad", etc., as contained in the original Act to Regulate Commerce. These decisions are more fully referred to under the following point:

IV.

THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT APPLY TO EXPRESS COMPANIES.

This court and the Interstate Commerce Commission have already construed substantially the same words now under examination.

The original Act to Regulate Commerce (24 Stat. at L. 379, approved February 4th, 1887) was limited by its terms as is the Employers' Liability Act of 1908.

Act to Regulate Commerce.	Employers' Liability Act.
"*Any common carrier* or carriers engaged in the transportation of passengers or property wholly *by railroad* or partly by railroad and partly by water, when both . . ."	"*every common carrier by railroad.*"

The Interstate Commerce Commission held (*In re* Express Companies, 1 I. C. C. 677) that express companies were not within this act.

This decision was followed in

United States *v.* Morsman, 42 Fed. 448.

Southern Ind. Exp. Co. *v.* U. S. Exp. Co., 88 *id.* 658.

Same case (in C. C. A.) 92 *id.* 1022.

And the Supreme Court held to the same effect in Amer. Exp. Co. *v.* U. S., 212 U. S. 522, where it said at page 534:

> "As originally reported the Act did not apply to Express Companies. The Section was originally framed with the intention of making a provision for railroad carriers."

In 1906 the Act to Regulate Commerce was amended so as to apply to express companies.

Certainly after all of this, the following language used by the Interstate Commerce Commission in its decision above referred to is peculiarly applicable now:

> "It is moreover true, as claimed, that the express business, so-called, has been of such long standing and presents such a well known and complete organization in every portion of the country that it must be considered to be a subject which was perfectly understood by Congress at the time of the enactment of the law in question. More than this, it is a business which has heretofore and frequently been the occasion of distinct legislation by Congresss, both in connection with railroad business and as contradistinguished therefrom" . . .

State legislatures have passed statutes and state boards and courts have rendered decisions based upon an application, to the language used by Congress in 1908, of the construction that this

and other courts have placed since 1887 upon the same words, as then used by Congress. If the decision herein of the Circuit Court of Appeals for the Fifth Circuit be allowed to stand, serious and wide confusion will result.

V.

THE EMPLOYERS' LIABILITY ACT, EVEN IF APPLICABLE TO EXPRESS COMPANIES, WOULD NOT RENDER VOID A RELEASE FROM LIABILITY NOT CREATED BY THAT ACT.

Taylor was not an employe of the railroad company (R. 47, 51 and 78) and his suit was not based upon any liability created (or even alleged to have been created) by that Act. Likewise, the suit brought by Petitioner against Taylor did not involve any liability created by that Act. On this point the Circuit Court of Appeals below said at the end of its opinion (R. 94):

> "Appellant is not seeking relief under the terms of the Employers' Liability Act, but he is insisting that that part of the contract which the Express Company claims deprived him of all protection, is void. We so hold."

But all that that Act provides in this regard is

> "Sec. 5. [*Agreements, etc., for exemption from liability—set-off of insurance, etc., con-*

tributions.] That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void . . . ."

VI.

THIS IS A PROPER CASE FOR THE EXERCISE OF THE COURT'S POWER TO ISSUE A WRIT OF CERTIORARI.

The jurisdiction of the District Court is based on diversity of citizenship and not on any other ground, and the decision of the case by the Circuit Court of Appeals, although resting upon the construction of the Federal Employers' Liability Statute, is final and this court can correct the erroneous interpretation of this federal statute upon *certiorari*, and in no other way.

American Sugar Ref. *v.* New Orleans, 181 U. S. 277, 279.

The Interpretation of this federal statute is of great and widespread importance.

The fact that the Circuit Court of Appeals has taken this view of it (different as it is from that of (*a*) the District Court, the court of last resort in the State of New Jersey, (*b*) the Interstate Commerce Commission, and (*c*) this court itself,

in construing the same wording when used in the original Act to Regulate Commerce), indicates that the question must be open to controversy and shows that an actual conflict exists, at least between this Circuit Court of Appeals and the court of last resort in New Jersey.

See *ex parte* Lau Ow Bew, Petitioner, 141 U. S. 583, where this court said:

> "It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction; and it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself and sufficiently open to controversy to make it the duty of the Court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error." And

Forsyth *v.* Hammond, 166 U. S. 506, where this court said:

> "While this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised and only when the circumstances of the case satisfy us that the importance of the question involved, the

necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of the State or some matter affecting the interests of this nation in its internal or external relations, demand such exercise."

See also:

Montana Mining Co. *v.* St. Louis Mining Co., 204 U. S. 204.
Fields *v.* U. S. 205, U. S. 292.
St. L., K. C. & C. R. R. Co. *v.* Wabash, 217 U. S. 247.

WHEREFORE, it is respectfully submitted that the writ of *certiorari* should issue as prayed.

May, 1918.

BRANCH P. KERFOOT,
Attorney for Petitioner.

E. O. SYKES,
J. A. SYKES,
CHAS. W. STOCKTON,
Of Counsel for Petitioner.

[B-2969]

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Supreme Court of the United States

October Term 1919. No. [redacted]41

WELLS FARGO & COMPANY,
Petitioner-Complainant below,

against

OSCAR G. TAYLOR,
Respondent-Defendant below.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

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Supreme Court of the United States

OCTOBER TERM 1919.

No. 112.

WELLS FARGO & COMPANY,
Petitioner-Complainant below,

against

OSCAR G. TAYLOR,
Respondent-Defendant below.

BRIEF FOR RESPONDENT-COMPLAINANT BELOW.

Statement.

This case comes here on a writ of *certiorari* to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit, reversing the decree of the District Court granting the complainant's application for a permanent injunction.

The suit was instituted to compel the specific performance of a contract entered into between the complainant and the respondent July 12, 1910, and to restrain the respondent from collecting a judgment he had obtained in the State Court of Mississippi.

The principal question in this case is whether the Federal Employers' Liability Act (approved April 22nd, 1908) does or does not apply to an express company, like this petitioner, which does not operate or direct any railroad or railroad trains, but which by virtue of a contract with a railroad company has its express matter transported for it over the lines and upon the trains of that railroad for an agreed compensation.

Pursuant to a contract with the St. Louis and San Francisco Railroad Company, in which as part consideration for the carriage of its express matter, the express company agreed to protect it from any claims for injuries to employes of the express company (R. 11), this petitioner, on Dec. 8, 1909, sent certain interstate express shipments, in the custody of the respondent as its express messenger, between points on the line of said railroad. The train was wrecked and the messenger sustained personal injuries (R. 61). He sued the railroad company in the State Court (R. 28). The express company, after having tried unsuccessfully to have itself made a party to that action, began an equity suit in the Federal District Court for the Northern District of Mississippi, seeking to restrain temporarily and upon the final hearing therein to enjoin perpetually said Taylor from proceeding with said law suit against the St. Louis and San Francisco Railroad Company and for a decree that he specifically perform and carry out his agreement by which he had assumed all risk of his said employment and had agreed to hold harmless both the express company and the railroad company (R. 22).

Both the contract between the railroad company and the express company and the "Messenger's Agreement" executed by said Taylor were set out at length as parts of the Bill in this suit (R. 7).

The motion for a restraining order was denied. Said Taylor, on July 12, 1910, obtained judgment for $4,000.00 against the railroad company, and this fact was alleged herein by a Supplemental Bill (R. 61).

Later, the State Supreme Court meantime having sustained said Taylor's judgment against the railroad company, a new motion for temporary injunction herein was granted (R. 61).

The cause was heard at the April term, 1914, of the United States District Court, and on October 2nd, 1914, a final decree was rendered in favor of this petitioner and against said Taylor.

Taylor appealed to the Circuit Court of Appeals and the decree was reversed and the cause remanded, the court holding that the bill was insufficient, in that it failed to allege that said Taylor was not a joint employe of the railroad company and this petitioner, and was not in the employ of the railroad company at the time of his injury.

In the lower court the bill was amended accordingly and additional testimony was introduced by each party. Decision was rendered in favor of the appellee, sustaining all the allegations of the bill (R. 55). This decree in part reads as follows:

* * * "and it appearing to the Court that all the allegations of the Original Bill, and the amendment thereto, and the supplemental bill, are true as therein stated, and that the institution

and prosecution of the suit in the State Courts of Mississippi by the defendant, Oscar G. Taylor, against the St. Louis and San Francisco Railroad Company was in direct violation of the Messenger's agreement, a contract entered into between the said Taylor and the complainant Wells Fargo & Company, and was a fraud practiced by the said Taylor upon the complainant"; * * *

From this decree also an appeal was taken by said Taylor and the Circuit Court of Appeals has now reversed that decree and holds that the "Messenger's Agreement" is made void by section five of the Federal Employers' Liability Act, approved April 22nd, 1908 (R. 60).

ASSIGNMENTS OF ERROR IN THE CIRCUIT COURT OF APPEALS.

The respondent's assignments of error in the Circuit Court of Appeals were:

1. The District Court erred in permitting the complainant to amend this bill.

2. The District Court erred in refusing to dismiss the bill and dissolve the injunction because:

(a) The contract sued upon was contrary to public policy.

(b) The contract sued upon was void under Section V of the Federal Employers' Liability Act.

(c) The Federal Court had no jurisdiction to enjoin the enforcement of a judgment secured in the State Court.

The petitioner contends here that the Circuit Court of Appeals erred in reversing the decree of the District Court upon any of the above assignments of error.

FIRST POINT.

The Federal Employers' Liability Act does not apply to express companies.

(a) *This Court has inferentially held that the Act applies only to Railroads.* The first Federal Employers' Liability Act approved June 11, 1906, applied to "every common carrier engaged in trade or commerce in the District of Columbia or in any territory of the United States or between the several states, etc., or with foreign nations."

This act came before the Supreme Court in what is known as the First Employers' Liability case, *Howard* vs. *The Illinois Central Railroad Company,* 207 U. S. 463; and was held invalid by this court in that it went beyond the power of Congress under the Commerce clause by including all employes of such carriers and not limiting the act to employes engaged in such commerce.

Following this decision, Congress passed the present act, approved April 22, 1908, applying it to "every common carrier by railroad while engaged in commerce between any of the several states or territories or between any of the states and territories or between the District of Columbia and any of the states or territories or between the District of Columbia or any states or territories and any foreign nation."

In *Mondu* vs. *N. Y. N. H. & H. Ry. Co.,* 223 U. S. 1, this court held the present Act constitutional.

"Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and it is imposed for the benefit of all employes of such carriers by railroad who are employed in interstate commerce * * * But it does not follow that this classification is violative of the 'due process of law' clause of the Fifth Amendment. Even if it be assumed that that clause is equivalent to the 'equal protection of the laws' clause of the Fourteenth Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. Tested by these standards this classification is not objectionable. *Like classifications of railroad carriers and employes for like purposes,* when assailed under the equal protection clause, have been sustained by repeated decisions of this court. *Missouri Pacific Ry. Co.* vs. *Mackey,* 127 U. S. 205: *Louisville & Nashville Railroad Co.* vs. *Melton,* 218 U. S. 36; *Mobile, Jackson & Kansas City Railroad Co.* vs. *Turnipseed,* 219 U. S. 35." (Italics ours.)

It will be seen that Mr. Justice Van Devanter considered this act to be a classification of railroad carriers of the same character as the classifications considered in the cited cases, all of which construed statutes applying only to "railroad companies." We submit that the above

case is an express holding of the U. S. Supreme Court, that the term "common carrier by railroad" does not include express companies within this meaning but applies only as it says to "railroad carriers." So far as the petitioner has been able to discover, this Act has never been held to cover any other business than railroading.

(b) *The intention of Congress to so limit the application of this Act is conclusively shown by the Senate Record at the time the Act was under discussion..* At this time the bill had passed the House in practically its present form, although there had been considerable discussion by the members of the House as to whether it should not be extended to include all common carriers. The bill was supported by Senator Dolliver, Chairman of the Committee on Interstate Commerce. At the end of Senator Dolliver's speech favorably reporting the bill, Senator Foraker interrupted as follows:

> "Before the senator from Iowa closes his remarks I want to ask him simply for information—I have had no opportunity, this bill having passed the House only two or three days ago, to read the report which was made in the House in support of the bill—what reason the House gave for limiting the application of this bill to *carriers by rail,* instead of applying it as we did in the law of 1906 to all interstate carriers whether by rail or by water or otherwise."
>
> "Mr. Dolliver: I have read, Mr. President, the House report with some curiosity on that question and I regret to say that nothing appears so far as I remember, in the report,

to indicate why the House took that action; but in view of the fact that a question of the constitutionality of the act, because it was made applicable to *railways to the exclusion of other interstate carriers*. was afterwards raised in the House, I have thought that may be someone not particularly interested in the ultimate success of the statute may have secured the limitation measure in that way. Although I do not think that the law is any less constitutional because it is made applicable to all common carriers over whom we have jurisdiction, because there ought to be uniformity—uniformity along the broad lines of justice." (Congressional Rec., Apr. 9, 1908, p. 4528.)

This explanatory statement seems to have caused considerable debate, and it was moved that the act be amended to include all common carriers on land or water. This was opposed by Senator Carter of Virginia, who spoke in part as follows:

> "I desire that this enactment shall apply to the great army of men who are engaged in *operating trains* in interstate commerce. If we succeed in getting through the Congress an enactment which will be approved by the Supreme Court on that subject, we will have achieved a great triumph, and we can later take up the subject of the rights of seamen on board the ships. The mechanism of the ship is very materially different in different cases. The steam vessel, the sailing vessel, and the rules and regulations applicable to each, will have to be considered then. The adjudications under maritime law will be the subjejct of investigation, and it will prove a most instructive line of inquiry when we reach that branch of the subject.

> At present, Mr. President, I desire to cooperate with my fellow senators here in the passage of a bill *which relates to railroad employees alone* and I hope that the bill as it came from the House will pass the Senate without being complicated by needless extension to other less subjects." (Italics ours.)

The amendment was defeated, and the bill was passed in the same form.

(c) *Similar language in other similar Acts has been construed as not applicable to express companies.* While the above cited case is the only one bearing directly on the scope of the term "common carriers by railroad" in the Federal Employers' Liability Act, the same language employed by Congress in other acts has been held to apply only to railroads, and under the well established rule that language previously interpreted by the courts will be presumed to have been used by the legislature in the sense of such previous interpretation, there is much authority for limiting it to railroad companies.

> *United States* v. *Falk,* 204 U. S. 143;
> *United States* v. *Cerecedo,* 209 U. S. 337;
> *Latimer* v. *United States,* 223 U. S. 501;
> *Bruce* v. *Tobin,* 245 U. S. 18.

The original Act To Regulate Commerce approved February 4, 1887 (24 Stat. at 1.379) was limited by its terms as is the Federal Employers' Liability Act of 1908.

Acts to Regulate Commerce.	Employers' Liability Act.
"*Any common carrier or carriers* engaged in the transportation of passengers or property wholly *by railroad* or partly by railroad and partly by water, when both * * *	"*every common carrier by railroad.*"

The Interstate Commerce Commission held (in re Express Companies, 1 I. C. C. 677) that express companies were not within the application of the first Interstate Commerce Act, saying at page 683:

> "It is further claimed that the details of the Law in its various provisions are so framed as to apply distinctly to railroads and railroad companies, and that they do not apply to the carriage of property by express companies, without various implications and eliminations which give a somewhat strained construction to the language used; and to this reasoning also there is much force. For example, the first paragraph of Section 6 requires carriers "to print and keep for public instruction schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad." The words "its railroad," the express companies say, exclude the idea that they are intended by the Law, for they have no railroads; they neither own nor operate any railroad lines. It is true that they hire the use of the railroads of the railroad companies,

> or, in other words, they purchase the right of railroad transportation for goods which they undertake to transport; nevertheless, the language of this section and of other sections is not well chosen to clearly express an intention to bring express companies within their scope."

This reasoning applies exactly to Section I of the Federal Employers' Liability Act which provides that:

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering any injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in *its cars, engines, appliances, machinery, track, railroad-bed, works, boats, wharves, or other equipment.*" (Italics ours.)

So great was the similarity between the wording of these acts and so clear the inference to be drawn from this similarity and the decision of the Interstate Commerce Commission, that the Circuit Court of Appeals in this case felt itself constrained to distinguish the decision of the Interstate Commerce Commission from the present case, saying (R. 62):

> "In reaching a conclusion that the express companies were not included an unconvincing argument was based upon the use of the word 'wholly'. The Commission says:

'The use of that word in the section which was evidently framed with the greatest care affords a fair foundation for the claim that the Act does not describe the modes of transportation employed by express companies with sufficient precision to bring them within its terms.'

The proposition which seems to have been most meritorious in reaching the conclusion was:

'That the details of the law in its various provisions are so framed as to apply distinctly to railroads and railroad companies, and that they do not apply to the carriage of property by express companies without various implications and eliminations which give a somewhat strained construction to the language used.'

A number of examples are given in support of this proposition. The Commission finally suggests:

In case of doubtful jurisdiction, it is far better that the legislative body should resolve the doubt.' "

Notwithstanding this opinion of the lower court as to the weakness of the reasoning involved, the decision of the Interstate Commerce Commission was followed in:

United States vs. *Morseman,* 42 Fed. 448;

Southern Ind. Exp. Co. vs. *U. S. Exp. Co.,* 88 id. 659;

Same case (in C. C. A.), 92 id. 1022.

This Court also held to the same effect in *American Express Company* vs. *U. S.,* 212 U. S. 522, where it said at page 534:

> "As originally reported the Act did not apply to Express Companies. The Section was originally framed with the intention of making a provision for railroad carriers."

Of this decision the lower court in this case uses the following language:

> "This holding of the Interstate Commerce Commission was not more than acquiesced in by the courts. *Am. Ex. Co.* vs. *U. S.*, 212 U. S. 522, 29 Sup. Ct. 315, 53 L. Ed. 635. It is to be observed that the language of the act which was under construction is very different from that employed in the Employers' Liability Act. Even if the processes of reasoning were entitled to greater respect, the decision would not be held applicable to the present case."

The fact that Congress, in 1906, without waiting for the Interstate Commerce Commission decision to be reviewed by this court, amended the Act to Regulate the Interstate Commerce so that it specifically included express companies, indicates that Congress, as well as the Supreme Court "acquiesced" in this interpretation of the language of the original Act.

Certainly the language used by the Interstate Commerce Commission is peculiarly applicable to this case (I. C. C. 682).

> "It is moreover true, as claimed, that the express business, so-called, has been of such long standing and presents such a well known and complete organization in every portion of the country that it must be considered to be a subject which was perfectly understood by Congress at the time of the enactment of the

> law in question. More than this, it is a business which has heretofore and frequently been the occasion of distinct legislation by Congress, both in connection with railroad business and as contradistinguished therefrom."

As the Employers' Liability Act has been held by this Court to be *in pari materia* with the Safety Appliance Act (*San Antonio R. R. Co.* v. *Wagner*, 241 U. S. 476, 484), the language used by Congress in the latter Act is particularly persuasive in considering the interpretation to be given the language of the former. In the Safety Appliance Act of March 2, 1893, Section 1, it was forbidden to "any common carrier engaged in interstate commerce by railroad to use on its lines any locomotive, engine, etc." The same language is used in Section 1 of the Ash Pan Act of May 30, 1908. Subsequent sections of the above Act of March 2, 1893, refer to *such common carrier*, but Section 3 says, "when any person, firm, company or corporation engaged in interstate commerce by railroad," etc. This language is even broader than the act under discussion. Section 4 says, "it shall be unlawful for any *railroad company* to use any car not provided with secure grab irons." It is to be noted that in this Act Congress uses the phrases "common carrier by railroad," "railroad company" and "corporation engaged in interstate commerce by railroad" interchangeably, and that in Section 2 of the Ash Pan Act of May 30, 1908, the court uses the exact language as in the Act now under consideration, "it shall be unlawful for *any common carrier by*

railroad in any territory * * * to use any locomotive not equipped with an ash pan," etc.

The Hours of Service Law, Section 1, uses the expression "common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad, etc." The latter part of this section defines the meaning of some of these terms as follows, viz:

> "The term Railroad as used in this Act shall include all bridges and ferrys used or operated in connection with any railroad, and also all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract agreement or lease; and the term Employees as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any trains."

In other words, under the above definition, an employe of a common carrier of interstate commerce by railroad, means a person actually connected with the operation or movement of trains and it follows that this person's employer must necessarily operate or move such trains. This excludes any possibility that express companies are included by this term.

An express company, we submit, could not be spoken of as a common carrier by railroad nor as a common carrier by water, nor as a common carrier by stage-coach. It is simply a common carrier of express matter, and when Congress desires to legislate about this very important branch of the business of the country and the corpora-

tions engaged in it, it will use the term "express companies", just as it did in the amendment of 1906 to the Interstate Commerce Act.

Thus in the Act of June 29, 1906, known as the "Twenty Eight Hour Live Stock Transportation Law", Congress specifically provided, "That no railroad, express company, car company common carrier other than by water, etc."

Moreover, the sense in which Congress used the words "common carrier by railroad" is admirably shown in the report of the Committee appointed in 1910, for the purpose of investigating "Employers' Liability and Workmen's Compensation". By a joint resolution of Congress passed on June 25th, 1910, a commission was created for the purpose of making a thorough investigation of the subject of "Employers' Liability and Workmen's Compensation". This Committee in due time made its report to the President, and the President submitted this report to Congress on February 20, 1912. In Volume 1, Page 59 thereof under the heading "(B)" THE PROPOSED LAW CONFINED TO COMMON CARRIER BY RAILROAD", said subdivision reads as follows:

> "It will be observed that common carriers by railroad constitute the only class of employers covered by the proposed law, though the commission has been urged to include other classes of employers who may be subject to the regulating power of Congress. The Commission has not deemed it advisable to follow these suggestions, but after very thorough consideration has confined the operation of the law which it proposes to *Railroad Companies* for the following among other reasons.

(1) Because, as it seems to the Commission, the law as applied to the railroads is clearly constitutional for the reasons already set forth, and it would not be wise to endanger its validity by including other employers as to whom the authority of Congress is not so clear, thereby introducing into the proposed law an element of uncertainty which would not otherwise exist. For example, as to some of these other employers, it may be plausibly urged that they are not engaged in a class of work or with instrumentalities greatly or inherently dangerous, and while this fact would not be conclusive against the validity of the law, it would eliminate or detract from the force of the arguments, already indicated, in support of it when confined to the extra hazardous occupation of railroading. As to still others the connection between the direct effect of a law to promote the safety of the employees and the consequent effect of safe-guardiing the commodities and passengers with which the employees deal is not entirely clear, as we think it is in the case of the railroad service considered by itself.

(2) The proposed law follows in this respect the amended Employers' Liability Law which has been upheld by many of the Federal Courts upon grounds peculiar to the railroad service, and since the main portion of this report was dictated by the decision of the Supreme Court of the United States in the case of *Mondou* v. *New York, New Haven & Hartford Railroad Co.,* in an opinion delivered by Mr. Justice Van Devanter on January 15, 1912 (223 U. S. 1).

(3) The railroad companies affected employ a great army of employees and have invested

> a vast amount of capital; the service extends into every part of the country, and altogether furnishes a field of such extent for the operation of a law of this character and presents so many features differing essentially from other classes of industry that a law whose details would be appropriate to that service would be in many respects inapplicable to other forms of industry. The railroad industry therefore may well be dealt with separately, particularly in the initial stage of the legislation. If hereafter it shall be found wise to extend the provisions of the law to other interstate carriers such as telegraph and telephone lines, or to other industries engaged in interstate commerce, that may readily be done by amendment or supplemental legislation as has been done in the case of the Interstate Commerce Law."

The court will notice that the above quotation begins by using the term "common carrier by railroad," and in the same paragraph uses the term "railroad company" as meaning the same thing or as an interchangeable term.

The business done by express companies was not the sort which Congress intended to regulate by this act. The express company does its transportation through other carriers in most instances. There was a time when all transportation was by pony express and stage coach. It uses steam vessels and sailing vessels and automobiles for transportation as well as dogsleds and railroads. It is a common carrier, admittedly, but could not be described as a common carrier by railroad.

The speech of Senator Carter of Virginia above quoted, as well as the fact that the Senate

defeated all attempts to extend the act beyond common carriers by railroad clearly show that the act was never intended to cover the express business in general. Moreover, by virtue of these contracts with railroad companies, the express company neither owns nor operates railways, trains or cars propelled by dangerous agencies nor employs people to operate them. There are no employes in danger on account of the negligence of fellow employes of express companies on account of the operation of trains. An employe of an express company is in no danger from the acts of his fellow servants and he is in no more danger from the operation of cars than any one else who rides upon a passenger train. He is in no danger from defective machinery, cars or equipment except as any passenger would be. We submit, therefore, that there would be no reason why this act should apply to the employes of an express company.

Résumé.

It will be seen therefore, that the term "common carrier by railroad" has been very frequently employed by Congress and apparently employed in the sense synonymous with railroad companies. To sum up briefly these instances:

(1) The Employers' Liability Act now under discussion in the debates in Congress on its final passage in its present form appears to have been limited to railways and men operating trains on railways.

(2) On coming before this court for the first time, in *Mondu* vs. *N. Y. N. H. & H. R. R. Co. supra,* the terms "common carrier by railroad," "railroad carrier" and "railroad companies" were apparently construed as synonymous terms.

(3) Practically identical language in the original Interstate Commerce Act was construed by the Commerce Commission, the body charged with its enforcement, as being limited to railroad companies and this construction was followed by the Federal Courts, including this court.

(4) The Safety Appliance Act is construed by this court as in pari materia with the Employers' Liability Act using the terms "common carrier by railroad" and "railroad company" interchangeably, and the text of both acts, as well as the Hours of Service Law in which the same term is employed, so clearly, by their reference to peculiarities of the railroad business, refer only to railroad companies that it is little wonder that this particular question of the applicability of the act to express companies is here raised for the first time, notwithstanding the fact that the act has been in force for more than eleven years.

(5) The common understanding and general construction of the effect of the term "common carrier by railroad" is very forcibly illustrated by the report of a committee created by joint resolution of Congress for the investigation of employers' liability and workmen's compensation which uses the terms "common carrier by railroad" and railroad companies" as interchangeable terms and

makes its recommendations specifically with respect to railroad companies.

From the consideration, therefore, which the particular question before the court has had by the courts, the Interstate Commerce Commission or other public bodies, it clearly appears that the term "common carrier by railroad" has been without dissent, up to the present case, held to mean railroad companies who are common carriers, probably as distinguished from those railroad companies who are private carriers, such as lumber railroads or other private interests which have not engaged to serve the public in the capacity of common carriers.

The opinion of the court below in which the contrary was held, is the first holding of the kind that we are able to find and is of little assistance to us in arriving at the reasons which govern the court in reaching this conclusion, since the court appears to have assumed in advance of its decision that the term "common carrier by railroad" included any common carrier who, by contract or otherwise, did a part of its business over a railroad line. We submit that this assumption of the court below is absolutely unwarranted by the facts, and that a substantial difference exists between a common carrier operating a railroad whose employes are subject to hazard by reason of their occupation such as are covered by the Act, and a common carrier who merely has its business carried over a railroad and whose employes have nothing to do with the operation of trains.

Notwithstanding the conclusive presumption that Congress used the language "common carrier

by railroad" in the sense in which it had been previously interpreted, not only by the body charged with the enforcement of an act containing such language, but by the courts as well, the court below, usurping the function of the legislature, endeavors to give a wider application to the language employed in the act, apparently upon the ground of public policy and the tendency of the times.

We have shown earlier in this brief how the Circuit Court of Appeals attempted to explain away the importance of the decision of the Interstate Commerce Commission in 1 I. C. C. 677.

It then takes up an analysis of *Robinson* vs. *B. & O. R. R.*, 237 U. S. 84, which it declares is not a conclusive holding that "a messenger, hired by an express company, is not an express company employee." Such a proposition has never been advanced by the petitioner and it seems probable that the learned Judge of the Circuit Court of Appeals meant that it was not authority for the proposition that an express messenger is not a railroad company employee.

Whatever may have been its real opinion of the Robinson case, the Circuit Court of Appeals then proceeded to elaborate its reasons for its theory that express companies are included in the application of the Employers' Liability Act. It discusses the theory that employees of the express company are employees both of the railroad company and the express company but finally discards it as not necessary for its decision, which it then proceeds to base upon the general ground that the language of the Act clearly and unequivocally applies directly to express companies.

It is submitted that the language of the Act as a whole, and especially Section 1, clearly indicates that it contemplates carriers who own and operate railroads, rather than mere users of transportation privileges. So far from being clearly and unequivocally applicable to express companies, a careful reading of the Act shows that it is clearly and unequivocally inapplicable. It should be remembered that the Act is derogatory of the established principles of the Common Law and should therefore be strictly construed. Much of the reasoning used by the Circuit Court of Appeals in support of this decision is ambiguous—some is inexplicable. It is hard to follow this reasoning when it says:

> "No court ought at this time, in the face of the unequivocal language of Congress, to make a rule which would differentiate express company messengers, not alone from other persons engaged in the hazard of railroading, but from all other railroad persons engaged in hazardous businesses."

It is equally hard to follow this prophetic vision into a future where the Employers' Liability Act is nullified by the railroads farming out all their functions to intermediary transportation companies. The fact that the Act applies to railroad conductors is no more significant to show an intention by Congress to make the Act applicable to express messengers than to make it applicable to Pullman porters.

SECOND POINT.

The Employers' Liability Act, even if applicable to express companies, would not affect the contract in question.

The respondent Taylor relies especially on Section 5 of the Employers' Liability Act to avoid the release. As we have seen, this section provides that:

> "Any contract * * * the purpose * * * of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void."

It should be noted that these contracts are not rendered absolutely void, but only void, *in so far* as they attempt to release a liability created by the Act. It seems clear that express companies are not included in the scope of the Act, and therefore no liability is created thereby so far as they are concerned. The Circuit Court of Appeals devoted its whole opinion to an attempt to justify the inclusion of express companies in the terms of the Act on the theory that "if the terms of the Act apply to express companies, the contract between Wells Fargo & Company and the messenger is void," and having proved that point to its own satisfaction, it rested. A closer scrutiny of the Act, however, shows that this was *not* enough. For even if express companies are directly included within the Federal Employers' Liability Act, a release of the railroad company cannot be affected by the operation of

Section 5 of the Act, unless the Act creates a liability on the Railroad Company for injuries to express messengers.

The liability created by the Act is that "any common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * if such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employes of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, machinery, track, etc., or other equipment." This language clearly covers only the case of employer and employe and it has been held that Congress used these words in their usual significance. *Robinson* vs. *The B. & O. R. R. Co.*, 237 U. S. 84. In that case it was sought to bring a Pullman porter within the application of the Act by contending that he was really in the employ of the railroad, but this court refused to so hold, and held that Pullman employ s were not included in the operation of the Act. Certainly the duties of an express messenger are not more inseparably connected with the operation of a railroad than those of a Pullman porter and the services performed by the Pullman Company are just as much a function which the railroad company could properly perform as those performed by the express company.

This is not the sort of negligence against which the statute is aimed. It is clearly shown by debates in Congress that the act was aimed at the so-called fellow-servant doctrine and at the efforts of common carriers to exempt themselves from liability for their own negligence, but it has

never been decided or, so far as appellee has been able to discover, even contended before that the act goes so far as to make an employer liable for negligence of a third party or to establish a rule of public policy than an employe cannot assume as a condition of his employment the risk caused by the possible negligence of a third party.

THIRD POINT

The contract in question is not against public policy.

The case before the court is not the case of an employer attempting to exempt himself from negligence to his own employe, nor does it attempt to make the messenger assume the risks of injury from his fellow servants. The contract contemplated that the respondent would assume the risk of injury because of the possible negligence of a third party, the railroad company. It has been repeatedly held that contracts similar to the contract between the railroad and express companies are good. *Santa Fe, Prescott & Phoenix R. R. Co.* vs. *Grant-Willis Construction Co.*, 228 U. S. 177, and cases cited. The cases were decided on the ground that the companies when making these contracts are not acting as common carriers. Similarly, the contract between the company and its employe has been recognized as valid and not contrary to public policy since the decision of *Baltimore & Ohio* vs. *Voigt*, 176 U. S. 498.

The state as well as Federal courts have long recognized the soundness of these contracts, and the effect of a decision that this contract was avoided by the Employers' Liability Act would create a great deal of confusion and an absolute conflict between the Federal rule and that of many important state tribunals.

Eleven years have passed since The Federal Employers' Liability Act was enacted and yet, with the exception of the present case, we have been unable to find a reported case in which the contention was made that the Act applied to express messenger contracts. Yet many suits have been brought within this period for injuries to express company employees due to the negligence of the railroad companies' servants.

In practically all jurisdictions such contracts have been held not to be contrary to public policy.

McKay & Louisville vs. *N. R. Co. et al.*, 182 S. W. 874 (Tenn., February 11, 1916);

Perry vs. *Philadelphia R. & W. R. Co.*, 77 Atl. 725 (Del, June 28, 1910);

Higgins vs. *Erie R. Co.*, 99 Atl. 98 (N. J. 1916).

FOURTH POINT.

The Court below had jurisdiction to enjoin the enforcement of the judgment secured by respondent in the State Court.

The petitioner's bills, as amended, stated an original, independent, equitable cause of action. The bill was for the specific performance of a contract, and showed that the complaint had no adequate remedy in a court of law. The diversity of citizenship existed, and the amount in controversy give this court jurisdiction. Incidental to the specific performance of the contract, and in order that a court of equity might administer complete relief, an injunction was asked against the appellant prohibiting him from collecting a judgment for $4,000 obtained in the state court.

There are two reasons why this suit is properly maintainable and complete relief may be administered by the Federal Court, even though it be necessary to enjoin the collection of this judgment. The first is, that the gravamen and foundation of this suit is based upon the proposition that the plaintiff is entitled to a specific performance of this contract and has no adequate remedy at law. Suppose that Taylor had never filed his suit in the state court, but was merely threatening to file it, or had declined, upon request, to execute to the Railroad Co. and the Express Co. a release for the injury sustained, then a bill filed setting forth fully these facts would have been maintainable in a court of equity

under the well recognized rules. Instead, however, of this being the case, the appellant Taylor violated his contract by filing this suit. Upon his violation of the contract the Express Co. had a right to seek a court of equity to enforce the contract. It had the right either to file this bill in a chancery court of Mississippi, or to file the bill on the equity side of the docket of the United States District Court. Under its constitutional right it chose the latter court. The foundation of the equitable jurisdiction of the court is the specific performance of a contract. As an incident to that performance, and incidentally to preserve the status quo and to administer adequate and complete relief against the conduct of Taylor, it becomes essential to enjoin the collection of this judgment in the state court. We submit that the authorities hold that when the injunction is merely an incident, and not the foundation of the suit, then injunctions of this character are not violative of Sec. 720 of the United States Revised Statutes.

Second: The decisions of the Supreme Court recognize an exception under the above section where a judgment in the state court has been obtained by fraud. The fraud heretofore considered by that court has been that of a party to the suit in the state court, and that the judgment obtained there was obtained through fraud practiced on the state court. These suits, however, were maintained by parties who had also been parties to the suit in the state court. So, the exact question here presented is not presented in the opinions from which we quote. It is our

contention here, and the testimony and the decree of the lower court sustain it, that the appellant Taylor, by his conduct in filing the suit in the state court against the Railroad Co., and depriving this appellee of the provision of being allowed to defend that suit, has practiced a fraud upon the appellee. This being true, a court of conscience will not now permit him to reap the benefit of his fraudulent conduct. In direct violation of his contract, Taylor filed suit in a court of ladw of the State of Mississippi against the Railroad Co. The appellee, with whom Taylor had the contract, attempted to be made a party to this suit in order that it might protect its rights and remove the case to the Federal Court. The defendant Railroad Co. at the same time filed a motion asking that appellee be made a party defendant. The record shows that the petition of appellee was denied and the motion of the Railroad Co. overruled. It is a just inference from the record that Taylor resisted both the petition and the motion. At any rate, though due diligence was exercised by the Express Co., it was not permitted to become a party to the suit in the state court. It had no right of appeal from this decision of the court. Complainant has a right to its day in court. It could not become a party to the suit in the state circuit court, and in the exercise of its constitutional prerogaive it sought the jurisdiction of the Federal court. The equitable grounds of relief existing, we submit that this court will exercise and give to this

complainant adequate and complete relief. The leading case on this subject is *Marshall* v. *Holmes*, 141 U. S. 589, 599:

> "Such was the case made in the petition. The relief asked was an injunction against Mayer and the defendant in error, Holmes, sheriff of the parish, restraining them from executing the above judgments or any of them; that Mayer be cited to answer the petitioner's demand; that the judgments be annulled and avoided as obtained upon false testimony and forged documents; and that the petitioner have general and equitable relief. * * * (Statement of facts, p. 592.)
>
> "These authorities would seem to place beyond question the jurisdiction of the circuit court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud."

Terre Haute R. R. Co. v. *Peoria, etc., Co.*, 82 Fed. 943.

Payne v. *Hook*, 7 Wall. 425.

Barrow v. *Hunton*, 99 U. S. 80.

Insurance Co. v. *Hodgson*, 7 Cranch 332.

Hendrickson v. *Hinckley*, 17 How. 443.
Gaines v. *Fuentes, et al.*, 2 Otto 10.
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Donovan v. *Express Co.*, 94 C. C. A. 609.
Ex parte Cutting, 4 Otto 14.
Railway Co. v. *Insurance Co.*, 109 U. S. 168.
Jones & Laughlin L'd. v. *Sands*, 79 Fed. 913.
Credits Commutation Co. v. *U. S.*, 177 U. S. 311.

FIFTH POINT.

The amendment to petitioner's original bill was properly allowed by the District Court.

The DistrictCourt had the power and it was proper to allow an amendment after the cause was reversed and remanded. Equity Rule No. 9, *Insurance Company* vs. *Hill*, 193 U. S. 553; *United States* vs. *Lehigh Valley Railway Co.*, 220 U. S. 257; *Hardin* vs. *Boyd*, 113 U. S. 756; re *Sanford Fork & Tool Co.*, 160 U. S. 247, 258; re *Potts*, 166 U. S. 267.

The decree of reversal was based upon the pleadings and not upon the merits of the case. It was not a final decree nor did it order the District Court to enter a final decree dismissing the bill of complaint. *Smith* vs. *Adams*, 130 U. S. 167; re *Sanford Fork & Tool Co.*, 160 U. S. 247. The first

opinion of the Circuit Court of Appeals practically meant that the District Court should have sustained the demurrer to the petitioner's original bill. Had this been done the bill could then have been amended with legal court. Equity Rules 19 and 28; re *Sanford Fork & Tool Co.*, supra; *United States* v. *Lehigh Valley Railway Co.*, supra.

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. [redacted]41

WELLS FARGO & COMPANY, PETITIONER,

vs.

OSCAR G. TAYLOR.

BRIEF FOR RESPONDENT.

PAINE & PAINE,
Solicitors for Respondent.

THOMAS FITE PAINE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 112.

WELLS FARGO & CO., PETITIONER,

versus

OSCAR G. TAYLOR.

BRIEF FOR RESPONDENT.

ABSTRACT OF THE CASE.

1.

This case was appealed from the equity side of the docket of the District Court of the United States for the Eastern Division of the Northern District of the State of Mississippi. This was the second time this case had been appealed to Circuit Court of Appeals. The first appeal being reported in 220 Fed. Rep., "796," and 136 C. C. A., page "402."

The history and origin of the litigation is as follows. The appellee was an express messenger or guard traveling for appellant with express matter of appellant between Aberdeen

and Amory, Miss., over the branch railroad line of the St. Louis & San Francisco Railroad Co., which said railroad is hereafter referred to in this brief as the Railroad Co. Appellee received expressage from the main line of the said railroad and delivered expressage to the agents of appellant on the main-line trains of said railroad company. The main line of the railroad extended from Memphis, Tenn., through Tennessee and Mississippi, and into Birmingham, Ala. Appellant handled interstate as well as intrastate shipments and was actually engaged in handling interstate expressage at the time of his injury. That on the 8th day of December, 1909, while appellee was engaged in his work and while riding on the train of the railroad company and in a car furnished by the railroad company for the use of appellant and its agents or employees, and in which car the expressage was being carried, the appellee was injured by the derailment of the car in which he and the expressage was being transported. The derailment of the car was due to the gross negligence of the agents and employees of the railroad company, in the upkeep of the railroad track and the operation of the train, on account of which injury the appellant was permanently injured.

On the 10th day of February, 1910, the appellant sued the railroad company in the State court of Mississippi. Before the trial of the case the appellant made its appearance in the State court by written petition and motion asking the court to be allowed to be made a party defendant with the railroad company and simultaneously the railroad company filed a motion to require the appellee to make the appellant a party defendant. (See record, pages "73-74," affidavit of W. T. Ware, circuit clerk.) Both of these motions were overruled by the State court and no appeal was prosecuted therefrom to the Supreme Court of Mississippi by appellant. (See admission by counsel for appellant, record, page "50.")

After the overruling of this petition and motion, the case proceeded to trial and the railroad company offered in evidence the messenger's agreement, which is the Exhibit "B" to

the bill in this cause. But State court held it void as contrary to public policy of the State. This trial in the State court resulted in a verdict against the railroad company and in favor of the appellee for $4,000.00, the railroad making no defense on the question of their negligence. From this judgment an appeal was taken to the Supreme Court of the State of Mississippi by the railroad company, and was by that court affirmed. The appellant, the Wells Fargo & Co., filed its bill in the U. S. District Court on May 2, 1910, and afterwards was granted a temporary injunction restraining appellee from collecting this judgment until the bill should be finally heard.

The gravemen of the bill was for specific performance of the contract, the messenger's agreement, and that appellee be enjoined from collecting his judgment obtained in the Mississippi courts against the railroad company. The contract which the bill seeks to require the appellee to specifically perform is known in this record as the messenger's agreement or contract, Exhibit "B" to the bill, as appears on pages "23-25" of this record. This contract is to the effect that the appellee, in consideration of his employment by the appellant, would not make claim for injury against the said railroad company or the appellant, in the event he was injured by the appellant or the railroad company, while in the discharge of his duties as express messenger on his line of travel; and this waiver in the contract was binding even though the appellee was injured by the gross negligence of the appellant or the railroad company.

To the original and supplemental bills the appellee demurred on the ground that the bills were without equity, in that Exhibit "B" was void and unenforceable as being contrary to the Employers' Liability Act of the U. S., 35th Statutes at Large, chapter 149, page 55, and amendments, and also because the court had no authority to interfere with the jurisdiction of the State court by enjoining the appellee from proceeding to collect his judgment obtained in the State courts. These demurrers were overruled and appellee

answered and in his answer alleged the same defense and also denied that he signed the contract, Exhibit "B" to the bill. The district court sustained the bill, and from his decree appellee prosecuted his appeal to the circuit court of appeals, in which court a decree was entered reversing and remanding the case, for the reason that the bill was without equity, this court, through Judge Walker, holding that the bill failed to allege that the appellee was not an employee of the railroad company. (See 136 C. C. A., page 402.)

The appellee then filed a motion in the circuit court of appeals requesting the court to modify the decree so as to authorize the district court to allow the appellant to amend his bill in conformity with the decree. This motion was overruled by the circuit court of appeals and the appellant took no appeal therefrom. The appellee then filed its motion in the district court to dismiss the bill and dissolve the injunction, which motion was overruled by the district judge. The district court then, on motion of appellant and over the objection of appellee, permitted the appellant to amend the original and supplemental bills to the effect that the appellee was not an employee of the railroad company but was employed alone by the appellant. To the sustaining of this motion the appellee excepted and preserved his exception as is shown by the record, page "44." Appellee then filed his amended answer and set up the same defenses made on the first answer on the first appeal and other additional defenses not presented on that appeal, all as shown in this answer. (See record, pages 49-53.)

Upon the trial of this cause the district court took the same under advisement and in vacation rendered a decree sustaining the amended bills and perpetually enjoining the appellee from proceeding to enforce the collection of the judgment obtained by the appellee in the State courts, from which decree appellee prosecuted an appeal to the Circuit Court of Appeals, and in the Circuit Court of Appeals a decree was rendered that the bill was without equity and

reversed the case and dismissed the bill (see record, page 60), after which Wells Fargo & Co. obtained certiorari.

BRIEF OF ARGUMENT.

"A."

The bill is without equity, for the reason that the messenger's agreement, Exhibit "B" to the bill, page 23 of the record, upon which the relief in the bill is prayed, is void and unenforceable as violative of the act of Congress April 22nd, 1908, chapter 149, 35th Statutes at Large, page 65, sections 1 and 5 thereof, and amendments, for the reason that the appellant was a common carrier by railroad, handling interstate commerce, at the time appellee was injured, and the appellee was injured while handling interstate commerce, owing to the negligence of the agents, or officers or employees of appellee, to wit, the St. L. & S. F. R. R. Co., or the appellant and the St. L. & S. F. R. R. Co. were partners or coproprietors engaged as common carriers by railroad, handling interstate commerce, and appellee, a joint employee of both, was injured by the negligence of the employees of the railroad company, while handling interstate commerce. In either event, the alleged contract, Exhibit "B," is void, as violative of the above statute.

Bank of Ky. *vs.* Adams Express Co., 93rd U. S., page 174.
B. & O. R. R. Co. *vs.* Voight, 176th U. S., page 498.
Oliver *vs.* N. P. R. R., 196th Fed. Rep., 436.
Malloy *vs.* N. P. R. R. Co., 151st Fed. Rep, 1023.
Hooper *vs.* Wells Fargo & Co., 27th Cal. Rep., 11.
P., B. & W. R. R. R. Co. vs. Schubert, 224th U. S. page 603.
Meehan *vs.* Valentine, 145th U. S., page 611.
Ward *vs.* Thompson, 22nd Howard page 330.
Shumaker on Partnership, page 2.

The case of Robertson *vs.* B. & O. R. R. Co., 222nd U. S., page 506, will be distinguished from the above authorities as not applicable to the facts in the case at bar.

"B."

The decree heretofore by the circuit court of appeals on the first appeal of this case, as appears in 136 C. C. A., page 402, reversing and remanding the cause, was a final decree on the merits of litigation; hence appellant's sole remedy was by appeal by certiorari to the Supreme Court of the United States or for the Circuit Court of Appeals to have reserved a right for the appellant to amend the bill. On reversal the district court was without authority in law or equity to permit the appellant to amend the bill; especially is this so in view of the fact that the Circuit Court of Appeals refused to permit an amendment or to authorize the district court to allow an amendment and appellant took no appeal therefrom, all as appears by a motion of appellant and the decree of the Circuit Court of Appeals thereon. See motion and decree in this court. The district court should have sustained the motion of appellee and dismissed the bill and dissolved the injunction.

Bostwick, rec., *vs.* Brinkerhof, 106th U. S., page 3.

Lodge *vs.* Twell, 135th U. S., page 237.

City of Paducah, Ky., *vs.* East Tenn. Tel. Co., 229th U. S., page 476.

1st vol. Foster's Fed. Practice, page 576, Sec. 1, Note 17.

Am. Bell Telephone Co. *vs.* U. S., 15th C. C. A., 569-597.

Port *et al. vs.* Beacon Vacuum Pump & Elect. Co., 32nd C. C. A., 151-155.

Vessel Abby Dodge *vs.* U. S., 223rd U. S., page 166.

In re Sanford Fork & Tool Co., 160th U. S., page 247.

Foster's Federal Practice, vol. 3, pages 2136-2137-3155.

Mackall *vs.* Richards, 116th U. S., page 145.
Van Doren *vs.* Penn. R. R. Co., 93rd Fed. Rep., page 272.
Preferred Accident In. Co. *vs.* Baker, 88th Fed. Rep., page 814.
Hunt *vs.* Howse, 74th Fed. Rep., page 657.
Hubbard *vs.* Manhattan Tea Co., 87th Fed. Rep., page 51.
Southard *vs.* Russel, 16th Howard, page 547.
Watson vs. Stephens, 53rd Fed. Rep., page 611.
Woodward *vs.* Boston Lasting Mack. Co., 63rd Fed. Rep., page 611.

"C."

The United States district court was without jurisdiction to entertain the bill in this cause, the gravamen of which was to enjoin the collection of a judgment obtained by the appellant in the Supreme Court of the State of Mississippi. This bill as amended sought injunctive relief not as an incident to an existing cause in equity but as the primary object of the State courts first had and obtained; and

because

1st. It is contrary to public policy and the comity of courts for the United States courts to interfere with the jurisdiction of the State courts first had and obtained; and

2nd. It is violative of section 720 of the Revised Statutes of the United States and of section 265, chapter 11, of the Judiciary Act of March 3rd, 1911, of the United States.

Wayman *vs.* Southard, 10th Wheat., page 1.
Leath *vs.* Thomas, 97th Fed. Rep., 136.
Whitney *vs.* Wilder, 54th Fed. Rep., 554.
Mills, sheriff, *vs.* Provident Life & Trust Co., 100th Fed., 334.
Slaughter House Cases, 10th Wallace, 273.

Maloney *vs.* Mass. Loan Ass'n, 53rd Fed., page 209.
Foster's Federal Practice, vol. 1, pages 694-695.
Sargent *vs.* Helton, 115th U. S., page 348.
Moran *vs.* Sturges, 154th U. S., page 268.
Nelson *vs.* Camp, 191st Fed Rep., 712, 16th C. C. A., page 90.
Central Nat'l Bank of Boston *vs.* Stephens, 169th U. S., page 432.
Riggs *vs.* Johnson Co., 6th Wallace, page 166.

"D"

The appellant voluntarily sought the jurisdiction of the State of Mississippi Circuit Court, in the case of Appellee *vs.* The Railroad Co., and having been denied relief by that court did not exhaust its remedy by appeal from that court to the Supreme Court of the State of Mississippi, and did not exhaust its remedies in the State Court, to wit, the chancery court, and is therefore estopped or has waived its rights to proceed with the case in the U. S. district court. The messengers' agreement, page 23 was offered in evidence on the trial of the Appellee *vs.* The Railroad Co., in the State courts and the same was held void, as contrary to public policy, as an effort on the part of the railroad company to relieve itself from liability for its own negligence. This ruling should be binding on the U. S. court, as the appellant sought the jurisdiction of this court and did not exhaust its remedy in the State court.

Harkreader *vs.* Wadley, 172nd U. S., page 148.
Freeman *vs.* Howe, 24th Howard, page 450.
Buck *vs.* Colbath, 3rd Wallace, 334.
Taylor *vs.* Taintor, 16th Wallace, 366.
Joseph Wiswall *vs.* David Sampson, 14th Howard, 52
4th Vol. Federal Statutes Annotated, page 509 *et sequiter* U. S. *vs.* Pedroli, 111 Fed. Rep., 14.
Cavanaugh *et al. vs.* Tooney, 39 S. C. R., 142.

IV.

ARGUMENT.

In our argument we will take up and discuss the preceding propositions, lettered A, B, C, and D, *seriatim*. And we desire to present, first, proposition "A" to wit:

SECTION "A."

Under this division of our brief we argue that the messenger's agreement, Exhibit "B" to the bill, is void and unenforceable as violative of the employers' liability act of 1908, chapter 149, 35th Statutes at Large, page 65, section 5 thereof and amendments, and therefore the district court erred in not sustaining our motion to exclude the evidence of the appellant and to dismiss the bill and dissolve the injunction, which motion appears on pages 1 to 64 of the record; and the circuit court of appeals was correct in reversing the cause and ordering the trial dismissed.

1st.

We contend that the said employers' liability act, *supra*, is broad and comprehensive, and protects and extends to employees of express companies, when such express companies are common carriers of interstate commerce by railroad, and when such employees are engaged in handling said interstate commerce when injured.

2nd.

That if mistaken as to this, that under the contract between the appellant and the railroad company, as set out on pages 14 to 22 of the record, and under the law, the appel-

lant and railroad company were partners or coproprietors and the appellee was a joint employee of both, which being true, the said employers' liability act extends to the appellee and protects him against the messengers' agreement, Exhibit "B" and renders said Exhibit "B" void and unenforceable, and the appellee was not seeking any affirmation relief but merely defending on the ground that the contract is void under the employers' liability act.

We now discuss these two propositions in the order in which we have referred to them.

1st.

Does the employers' liability act of 1908 embrace express companies doing business of a common carrier by railroad and handling interstate commerce?

This question is *nova res* in the courts. We can find no reported case in which this question has been presented to the Supreme Court or the circuit courts of appeal, except the former appeal of this case, wherein Judge Maxey delivered a strong opinion, holding in the affirmative and in favor of our position. We confidently believe this court will give this question its careful attention and believe that the announcement of the court will be an adoption of Judge Maxey's opinion delivered on the former appeal.

The Supreme Court of the United States, in the case of Robertson *vs.* Baltimore & Ohio Railroad Co., 222nd U. S. p. "506," did announce that the employers' liability act did not extend to employees of the Pullman Company, but the case was decided on a different set of facts from the case at bar, and the relation-ship between the railroad company and the Pullman Company, was different from that between the appellant and the express company, in the case at bar, and we will discuss this case later on in our brief.

The language used in section "1" of the employers' liability act is as follows:

> "Every common carrier by railroad while engaged in commerce between the several States and Territories, etc."

It is evident from this language that Congress intended to make the act applicable to express companies or any other transportation company engaged in the business as a *common carrier by railroad;* if Congress had intended to limit the provisions of this act to railroads alone, it would have used the phrase *"Every railroad* doing the business of a common carrier," etc.

But this act uses, with precision and consideration, the adjective "every" as modifying the words "common carrier," which means or relates to more than two, and brings into greater prominence the notion that not one of all considered is accepted. The adjectives "every" and "all" are synonymous. And the use of this adjective clearly shows that Congress meant to include all common carriers by railroad, and should not be delimited to one common carrier by railroad, since Congress recognizes that there are other common carriers by railroad. We submit that if this statute is to be thus delimited by judicial legislation so as only to include railroads doing the business of common carriers, then it would be unconstitutional because it would be imposing liabilities on railroads doing the business of common carriers that are not imposed on other common carriers by railroad, to wit, express companies doing the business of common carriers when said express companies were acting as common carriers by railroad. The statute should be construed so as not to render it unconstitutional.

The evident purpose of Congress in enacting this act was to protect those who were compelled to undergo the hazards of earning their livelihood by working on railroads. And if

employees of express companies which are carrying on business of common carriers by railroad are forced to travel on said railroad and are necessarily subjected to the same dangers and hazards that employees of the railroad are subjected to, then certainly Congress intended this act to embrace such employees and to protect them from their improvident contract. And Congress evidenced its clear intent by employing the words "*every common carrier* by railroad," etc.

Judge Hughes in his opinion in the case of P., B. & W. R. R. Co. *vs.* Schubert, 224th U. S., page 603, in analyzing this act says:

> "And so when Congress decided to protect the safety of employees by establishing rules of liability *of carriers* by injuries sustained in the course of their service, it may make the rules uniformly effective."

We refrain from instancing the evils that would inevitably flow from a different interpretation of this act. Because we should know this court will readily apprehend them. We ask why should Congress enact a law, even if they have the constitutional right to do so, protecting alone the employees of railroad corporations doing the business of common carriers, and leave unprotected employees of express companies, engaged as common carriers by railroad, when said employees of the express companies ride on railroads and are subjected to the same dangers and hazards as the employees of railroads?

Was the appellant at the time of the injury to appellee a common carrier by railroad handling interstate commerce? It is admitted by the appellant that at the time of the injury that it was engaged in interstate and intrastate commerce as a common carrier. (See record, middle of page 47.) The appellant has been adjudged a common carrier by the Supreme Court of the United States in the case of Bank of Kentucky *vs.* Adams Express Co., 93rd U. S., page 174.

This case has been cited and approved in numerous subsequent decisions by the Supreme Court, and in none of them has this adjudication, that an express company was a common carrier, been repudiated or even questioned. See Western Union Tel. Co. *vs.* Call Pub. Co., 181 U. S., page 92; Express Co. *vs.* Croninger, 226th U. S., page 491; Express Co. *vs.* U. S., 212th U. S., page 522.

But, on the contrary, this adjudicated designation of express companies as common carriers is the legal name used in subsequent acts of Congress in classifying express companies. Under these authorities there can be no question but that express companies are common carriers in the United States. They are common carriers by steamboat, steamship, stage coach, railroad, or any other mode of transportation necessary for the carrying on of its business. We submit that in the case at bar the appellant was a common carrier by railroad, because at the time of the injury the appellant was transporting its expressage and messengers by railroad.

It is admitted by the bill that appellee was in the employ of the appellant at the time of the injury and the record discloses the fact, which is not disputed by counsel for appellant, that at the time of the injury appellee was engaged in handling interstate commerce.

We submit the conclusion that if the employers' liability act extends to embrace express companies by railroad, then the appellee can plead that the Exhibit "B" is void, since the appellant was engaged in interstate commerce as a common carrier by railroad and appellee was injured while employed by said common carrier by railroad so engaged and while handling interstate commerce, and Exhibit "B" is therefore void as contrary to section 5 of said employers' liability act.

2nd.

Was the appellee an employee of the railroad company when injured, and were the appellant and the railroad com-

pany partners or coproprietors at the time appellee was injured?

Under Exhibit "A" to the bill, which is the contract between the appellant and the railroad company, we argue that appellee was an employee of the railroad company at the time of the injury. And we base this assertion on the case of B. & O. R. R. Co. *vs.* Voight, 176th U. S., page 498. Quoting from the language of Justice Shiras, who delivered the opinion in the above-cited case, as follows:

> "The relation of a express messenger to the transportion company, in cases like the present one seems to us to more nearly resemble that of an employee than that of a passenger. His position is one created by agreement between the express company and the railroad company, adjusting the terms of a joint business company, the transportation and delivery of express matter; his duties of personal control in custody of the goods and packages if not performed by an express messenger would have to be performed by some one in the immediate service of the railroad company. And of course if his position was that of a common employee of both companies he could not recover for injuries that were caused, as would appear to have been the present case, by the negligence of a fellow servant."

We also insist that the railroad company in this case, to wit, the St. L. & S. F. R. R. Co., was the agent or the employee or a partner or coproprietor with the appellant. And since the appellee was injured by this agent, or employee or partner or co-proprietor of the appellant, he has the right to claim that his employment fals within the employers' liability act, and that therefore this alleged messengers' agreement is void and unenforceable.

See Oliver *vs.* N. P. R. R. Co., 196th Fed., page 432; Mallory *vs.* N. P. R. R. Co., 151st Fed., page 1023.

In the case of the Bank of Ky. *vs.* Express Co., 93rd U. S., page 174, railroad companies hauling express companies are held to be the agents of the express companies. This last case, *supra*, directly sustains the argument that in the case at bar the railroad company was the agent of the appellant and therefore the appellee was injured by the agent of the appellant and the contract, "Exhibit B," falls within the condemnation of section 5 of employers' liability act; in which section it is enacted "that if the employee is injured by the negligence of the employee, officers or agents of the common carrier, that any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

See also Hooper *vs.* Wells Fargo & Co., 27th Cal., page 11.

If the railroad company was not an employee or agent or partner of the appellant, what was the relationship? In the Voight case, *supra*, the court held that it was more nearly akin to the relationship of partners, and further held that the express messenger was a employee of the railroad company. This seems to be the better reasoning. Appellee was on the train of the railroad company at the time of his injury, subject to the same dangers and hazards as any other employee of the railroad company and was surely not a trespasser, nor was he a licensee, nor was he a passenger; he must, therefore, have been on the train as an employee of the railroad company or the railroad company was the agent or employee of the appellant; in which latter event the appellee would have been a co-employee of the railroad employees.

Were the railroad company and the express company in the case at bar partners or co-proprietors? If a construction of the contract shows they were partners then necessarily appellee was an employee of the railroad company as well as an employee of the appellant, and would have the right

to plead the messenger's agreement was void under the employers' liability act, regardless of the question as to whether or not this act applies to employees of express companies.

But if the appellant and the railroad company were partners or co-proprietors at the time of the injury, then unquestionably appellee could seek protection under this act as he was injured by the employees of the railroad company, and while engaged in handling interstate commerce. What, then, is a partnership? In the language in the opinion in the case of Meehan *vs.* Valentine, 145th U. S., page 611, and Ward *vs.* Thompson, 22nd Howard, page 330, and also Shumaker on Partnerships, page 2, we are informed that where parties contribute money or property to carry on a joint business for their common benefit and share in the profits that they are partners. Under the contract, Exhibit "A" to the bill in this case, it is shown that both parties, the railroad company and the appellant, contributed property to carry on a joint business and this business was for their common interest and both shared in the profits. The railroad company furnished cars, furnished heat and light, locomotion, space in their stations, hauled the wagons and horses of appellant, and contributed other property and rights; in return for all of which the railroad company was to get 55 per cent. of the gross profits from this express business, never to be less than $85.00 per mile. This contract, Exhibit "A," clearly indicates that it was a partnership transaction, called by a different name. The Exhibit "A" is the same kind of a contract that was had between Wells Fargo Co. and the Baltimore and Ohio R. R. Co., which was construed in the case of B. & O. R. R. Co. *vs.* Voight, 176th U. S., page 498, in which case the court, in construing this contract, said:

> "Our citations have been intended partially to disclose in a succinct form the nature of the express business; but more particularly in essense the express business is one that requires the participation of both

companies agreed upon in special contracts, thus creating to a certain extent a sort of partnership relation between them in carrying on a common carrier business."

The court held that they were carrying on a joint business, which created to a certain extent a partnership relation. Under this decision and the facts in the case at bar we have the appellant and the railroad company both furnishing and contributing property to carry on a joint business for their common benefit and both sharing in the profits; all the essential elements necessary to constitute a partnership. The facts in the case at bar and the contracts between the appellant and the railroad company show that they were either partners or co-operators, placing this case at bar in the same class as that of Oliver *vs.* The N. P. R. R. Co., 195th Fed. Rep., page 432, in which case the porter on the sleeping-car was held to be a joint employee of the sleeping-car company and the railroad company, and the court decided that he could plead the voidness of his contract as violating the federal employers' liability act.

The case at bar is clearly distinguished from the case of Robinson *vs.* B. & O. R. R. Co., 222nd U. S., page 506.

In the Robinson case, *supra,* there was no question raised as to this point; and the facts in that case and the contract showed clearly that the Pullman Company and the railroad were not partners or co-proprietors. In the Robinson case the railroad company did not contribute any property for the purpose of carrying on the business; it merely hauled the cars of the Pullman Company. A reading of these contracts will show clearly the difference in the relations of the railroad companies in the one case to the Pullman Company and in the case at bar to the express company. In the case at bar the evidence shows that the railroad company furnished parts of its station-houses, and furnished space in its cars, and

made other contributions of property to carry on the partnership business. The contract between the appellant and the railroad company also discloses the fact that the appellant had the right to use any employee of the railroad company as its employee. None of these facts appear to have been a part of the contract in the Robinson case. In the case at bar after the railroad company had furnished to the joint business or to the partnership business all these contributions of property and service, under the contract the railroad was to share in the profits to the extent of 55 per cent of the gross earnings derived from the express business on the lines mentioned therein. (See record, page 17, section 7 of the Exhibit A.") And on page 19 of the record this same contract shows that the express company and the railroad company were to have an annual accounting.

Where there is any partnership arrangement between two masters, wherein a servant is employed for the common business of both, the servant of either master will become fellow servants. McKinney, on Fellow Servants, page 46; R. R. Co. *vs.* Schneider, 45th Ohio State, page 678; Swainson *vs.* R. R., L. R., 3rd Exch. Div., 341.

Employment and payment of a person *are not* indispensable elements to create the relation of master and servant. D. & R. G. R. R. Co. *vs.* Gustafson, 21st Col., page 393; Gaines *vs.* Bard, 57th Ark., page 615.

We contend that under the contract, Exhibit "A" in this case, wherein the railroad company furnished property to carry on a joint business for the common benefit of the railroad and the express company, and wherein the railroad company shared in the profits, which said business was interstate commerce, for the mutual, financial benefit and advantage of the railroad company and the express company, brings the operation of the car and appellee, performing services in said car, within the meaning of the employers' liability act.

This court will observe that the circuit court of appeals in rendering the decree, from which the record was certioraried to this court, pretermitted all the assignments of error presented by the present appellee, except that assignment of error embodied in the preceding section of our brief; and that court in reversing the case and ordering the bill dismissed only considered the question argued in the preceding section of our brief, towit, the application of the employers' liability act to the appellee under the facts in the case.

But we respectfully submit that even though this court may hold that the circuit court of appeals was in error as to this question of law, yet the circuit court of appeals should be affirmed because of the other meritorious assignment of errors presented by the present appellee to that court; which said errors of the district court were not considered and passed on by that court. And if there is merit in the other assignment of errors as presented to that court, then the action of the circuit court of appeals should be sustained in reversing the case and ordering the bill dismissed. And we desire to discuss those other questions pretermitted by the circuit court of appeals, as set out in our brief under the sections "B," "C," and "D."

The decree rendered heretofore on the first appeal, as reported in 220 Fed. Rep., page 796, 136 C. C. A., page 402, was a final decree on the merits of the litigation, and the trial court was without authority to permit the appellant to amend the bills after the reversal and remanding of the cause; and after the circuit court of appeals refused to permit the appellant to amend or refused to authorize the district to allow an amendment, or refused to reserve a right for the appellant to amend, the sole remedy of appellant was by appeal to the Supreme Court of the United States. The lower court erred in permitting this amendment by appel-

lant and erred in overruling the motion of appellant to dismiss the bill and dissolve the injunction.

The district court should have sustained the motion of appellant, because the decree of the circuit court of appeals in No. 2716, its docket, was a final decree on the merits of the cause. A final decree is a decree which settles the equities of the case. The court will observe from reading the opinion of Judge Walker, in No. 2716, the first appeal of this case, that the cause was reversed and remanded for the reason that there was no equity in the bill. The cause was reversed and remanded without any instructions as to the allowance of any further proceedings in the case by the district court.

Under this decree the district court was powerless to take any action and should have sustained the motion of appellee and dismissed the bill and dissolved the injunction. To permit the bill to have been amended was tantamount to the filing of a new bill. Was this decree final?

Chief Justice Waite, in the case of Bostwick, Rec., Brinkerhof, 105th U. S., page 3, defines a final decree "As a decree terminating the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the circuit court below would have nothing to do but to execute the judgment or decree it had already rendered." And further in the opinion the same judge says:

> "If the judgment is not one which disposes of the whole case on its merits, it is not final."

Under these definitions and rules we submit that when the circuit court of Appeals on the first appeal of this case, No. 2716, decreed there was no equity in the bill, that was a disposal of the whole case on its merits and was final.

The court will thus apprehend from a reading of the opinion of Judge Walker that the circuit court of appeals reversed and remanded this cause and gave no further or additional directions for further proceedings under its de-

cree; but simply and plainly, in the language of the decree, "reversed and remanded the cause," because there was no equity in the bill, thus fully and finally disposing of the case on its merits. That court in so many words said there is no merit in the bill because no equity. Again, Justice Waite, in 105th U. S., page 429, in the case of Grant *vs.* Phœnix Life Insurance Co., defined a final decree, as he had previously defined it in the case of Bostwick *vs.* Brinkerhof, *supra*. And in the case of Lodge *vs.* Twell, 135th U. S., page 237, Justic Fuller defined what was a final decree, using the language of Justice Waite in the case of Daines *vs.* Kendall, 119th U. S., page 54, and the case of Bostwick *vs.* Brinkerhof, *supra*.

By applying these decisions to the decree in the case at bar the conclusion is inevitable that the decree of the circuit court of appeals was a final decree. The circuit court of appeals said there was no equity in the case, and necessarily reversed and remanded the case; not for any further proceedings in the nature of adding amendments, but for the purpose of having the district court to proceed in conformity with its decree, to wit, to dissolve the injunction and dismiss the bill.

The idea that after this final decree has been entered by the circuit court of appeals that the appellant could by amendment or by supplemental proceedings revise the case, is contrary to the procedure under the judiciary act and destructive of the rights of the appellee. To permit an amendment after final decree, where such a right to amend was not reserved by the circuit court of appeals, would enable the district court to breathe the breath of life into every case that the circuit court of appeals pronounced dead. The district court could not open the case after it had been remanded, unless permission had been granted in the decree and mandate of the appellate court. The district court could not in any way modify the judgment of the higher court and possessed no judicial function to exercise in this

matter; it could not exercise any discretion; all that the district court could do was to execute the judgment of the appellate court, which was merely a ministerial act. The judgment was final for the purpose of having the case reviewed by the supreme court, which court could alone terminate the litigation between the parties on the merits of the case when it reached that court; in order that the lower court might execute its old judgment upon affirmance by the supreme court.

Judge Lurton, in his opinion in the case of City of Paducah *vs.* East. Tenn. Tel Co., 229th U. S., page 476, says that the test of finality for the purpose of review by the supreme court on appeal is the face of the decree appealed from. On the reversal and remanding of this cause on its former appeal, suppose the appellant had not made its motion in the district court to amend; then what could the district court have done under this mandate? The answer is the only thing would have been to have dissolved the injunction and dismissed the bill. If this be true, then the decree of the circuit court of appeals was final, and the appellant should have appealed to the Supreme Court of the United States. The only right that was left to appellant, after the former decree in the circuit court of appeals, if it had any, was either to have appealed to the Supreme Court or to have filed a new bill. It could not patch up the old bill by amendment until after the circuit court of appeals had granted the motion or sustained the motion of the appellant, reserving to appellant the right to amend, which the circuit court of appeals refused to do.

It is very evident counsel for the appellant appreciated the fact that the district court had no right to allow amendments afer the decree was entered on the former appeal, because immediately after the decree was entered in No. 2716, in the circuit court of appeals, the appellant petitioned the circut court of appeals to grant it a rehearing, or if denied this that the decree be so modified as to expressly

authorize the appellant to make an amendment to its bills in the district court in conformity with the decree of the circuit court of appeals.

Why was the petition denied by this court as to the allowance of the amendment? It was done because the circuit court of appeals had decreed that there was no equity in the bill and consequently the bill should have been dismissed and injunction dissolved; and it was remanded to the district court so that the lower court could dissolve the injunction and dismiss the bill and protect the appellee by decree for any damages sustained by the wrongful suing out of the injunction.

The decree of the circuit court of appeals being final the appellant's only remedy was an appeal by the proper proceeding to the supreme court. Section 6 of the judiciary act says:

> "In all cases made final there shall be of right an appeal or writ of error or review of the case by the supreme court, etc."

Section 10 of the judiciary act says:

> "Whenever on appeal or writ of error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in which the circuit court of appeals is final, such cause shall be remanded to the district court for further proceedings to be taken in pursuance of such determination."

We ask what was the determination of the circuit court of appeals on the former appeal of this cause? It was this; that there was no equity in the bill or, in the language of Judge Walker, "the bill is to be regarded as one which fails to show that the plaintiff is entitled to the relief prayed and that the court was in error in the decree rendered thereon."

Thus putting an end to any subsequent experiments with

the court in the case by amendments. If the appellant was not satisfied by that decree it had the right to appeal to the supreme court and have the case reviewed and by not doing so it accepted the decree as the law and had no legal or equitable right to ask to have the bill changed by amendment.

Did the appellant have the right to amend the bill in the district court? Certainly not, because and if for no other reason, this court, the circuit court of appeals, refused to grant its petition to specifically instruct the district court to allow it to amend its bill or to reserve a right to amend.

It is said by Mr. Foster in his work on "Federal Practice" 4th edition, volume 1, bottom of pages 575 and 576, and note 17, as follows:

> "That an amendment may be allowed by the court at any time and even after final decree and after decision."

But says this writer:

> "In the *latter case ordinarily* leave from the appellate court to apply for the amendment must be obtained, and only will this amendment be allowed when it is reversed and the cause remanded for further proceedings."

In the case at bar no leave was granted for further proceedings because the circuit court of appeals in reversing and remanding did not grant this right, and on application of appellant, overruled this motion to allow an amendment.

Also see Am. Bell Telephone Co. *vs.* U. S., 15th C. C. A., pages 569-597; Post *et al. vs.* Beacon Vac. Pump & Elec. Co., 32nd C. C. A., pages 151-155; Watson *vs.* Stephens, 53rd Jud. Rep., page 31.

In the first case cited *supra*, the Am. Bell Tel. Co. *vs.* U. S., the United States had filed a bill to cancel certain

patents, etc. The American Bell Telephone Co. answered. On the trial the district court sustained the bill on all points. On appeal by the American Bell Telephone Co., and before the appeal was heard, the United States filed a motion in the C. C. A., that in case the C. C. A. found for the appellant, that it would reserve leave to the district court to permit an amendment by the United States to its bill setting up certain additional facts. But the circuit court of appeals, in reversing and remanding the case, said:

> "To grant this motion would under the circumstances violate all rules requiring diligence from parties complainant."

And the court refused to grant this amendment or to give the district court the right to permit the amendment.

The circuit court of appeals having refused to permit the amendment or to reserve a right to amend, the appellant's sole remedy was by appeal; so that if there was error in the opinion of the circuit court of appeals, the United States Supreme Court could correct the same, as it often does in reversing the circuit courts of appeal. The supreme court, if it had desired, could have directed the district court to permit an amendment, as was done in the case of the Vessel Abby Dodge *vs.* United States, 223rd U. S., page 165, in which case the supreme court, in reversing it, said that the United States would be allowed to make the necessary amendments to give the court jurisdiction.

In the case at bar the appellant prepared its case and submitted the same to the circuit court of appeals and having failed to state a case, as decided by the circuit court of appeals, and then after reversal by the circuit court of appeals, it moved the district court to be allowed to amend the bills, this being done after the circuit court of appeals had refused to authorize the amendment. As appears from this record the district court granted this motion of appellant, which in our

opinion was error, because the district court usurped the express authority given the circuit court of appeals by the judiciary act. As was said by Justice Gray in the case *In re* Sanford Fork & Tool Co., 160th U. S., page 247:

> "Where a case in equity is set down for hearing on bill and answer, the whole case is presented for final decree in favor of either party."

The case at bar was heard on bills, answer, and proof, and was down for final hearing. The decree rendered on the first appeal by the circuit court of appeals was a final decree. The circuit court of appeals was the only court which could have allowed the amendment, unless appealed to the Supreme Court.

See Foster's "Federal Practice," 4th edition, vol. III, pages 2136-2137, and especially page 2133, in which authority this author supports his text by many Supreme Court decisions of the United States to the effect—

> "That when in a decree against a plaintiff the appellate court is of the opinion that the facts show that the plaintiff has an equitable title to some relief, although not to any relief upon the case made by the bill, the decree may be reversed with directions for the allowance to amend."

By an examination of these authorities the court will observe that the District Court of Mississippi had no authority to permit or allow the amendment asked for by appellee.

See Mackall *vs.* Richards, 116th U. S., page 145, in which case Justice Waite says:

> "A motion was made in the court below, after mandate was received for leave to file a supplemental bill, setting up new defenses growing out of matters occurring after the original decree."

This judge held the motion was properly denied because there was no discretion left in that court to grant such a motion.

Under section 10 of the judiciary act, *supra*, it is stated:

> "In a case in which the decision in the circuit court of appeals is final, such cause shall be remanded to the district court for further proceedings to be taken in pursuance of said determination."

The notes to this quotation, section 10, as appears in the work 4th Federal Statutes Annotated, page 428, is as follows:

> "Under this provision the circuit court of appeals like that possessed by the Supreme Court has power to reverse the judgment below and permit the plaintiff to apply to it for the allowance of an amendment."

See also the following authorities: Van Doren *vs.* Penn. R. R. Co., 93rd Fed., p. 272; Preferred Accident In. Co., *vs.* Baker, 88th Fed., p. 814; Hunt *vs.* Howes, 74th Fed., p. 657; Hubbard *vs.* Manhattan Tea Co., 87th Fed., p. 51.

As the circuit court of appeals alone possessed the right to allow the amendment, this right should not have been exercised by the district court.

As persuasive and in support of this argument we presume to call the court's attention to the law that even a bill of review will not lie in a case of newly discovered evidence where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court or permission given by the appellant court to file such bill of review. And we cite one case, to wit: Southard *vs.* Russell, 16th How., page 547, in which case the court says:

> "Nor will a bill of review lie in the case of newly discovered evidence after the publication of the de-

> cree below where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords in England, and we think it is founded on principles essential to the proper administration of the law and to a reasonable termination of litigation between parties in chancery suits."

In our opinion there can be no question as to the right of the circuit court of appeals to grant leave to a complainant to file a motion asking that he be allowed to amend his bill in the lower court. This being true, its refusal to do so is reviewable by the Supreme Court of the United States. Upon its refusal to grant such a motion, the party making the motion must either appeal to the Supreme Court of the United States and obtain a reversal of the decision of the circuit court of appeals or abide by the decree of the circuit court of appeals in overruling its motion. We find from a careful examination of the authorities that the Supreme Court of the United States has frequently reversed the decision of the circuit court of appeals on motions of this nature, and we assume this to be sufficient to conclusively demonstrate that upon the denial of appellant's motion by the circuit court of appeals in No. 2716, on the former appeal, there was but one remedy left to appellant, and that was an appeal to the Supreme Court of the United States.

In concluding this section of our brief we respectfully submit that the district court erred, after the reversal of this cause, in overruling the motion of appellee to dismiss the bill and erred in sustaining the motion of appellant and in permitting it to amend the bills. To the initial this part of our brief is prolix and academic; our excuse for it is that the principles involved in it go to make up a part of the warp and woof of the incomparable system of our Federal practice

and procedure; the study of which has so deeply impressed us that we could not refrain from expressing our conviction and insisting upon the correctness of our position.

C.

The United States court was without jurisdiction to entertain the bill in this cause, the gravamen of which was to enjoin the collection of a judgment obtained by the appellant in the Supreme Court of Mississippi, because it is contrary to public policy and violative of section 720, Revised Statutes of the United States and of section 265, chapter 11, of the Judiciary Act of March 3rd, 1911.

The motion made by the appellee at the close of the testimony of the appellant in the district court should have ben sustained for another reason, to wit; because the court was without jurisdiction to grant the injunction, and also because the bill was without equity on its face. This discussion, therefore, properly falls under two general heads: 1st, the district court cannot enjoin the collection of a judgment obtained in the State courts because it would be in violation of section 720 of the Revised Statutes of the United States; and 2nd, because it would be a violation of the comity of courts.

1st.

It appears that the district court, on July 12, 1912 after the appelle had recovered a judgment in the Circuit Court of Monroe County, Miss., against the railroad company, and after the judgment had been affirmed by the Supreme Court of Mississippi, granted a temporary injunction restraining the appellee, his agents, attorneys, and all other parties to desist from attempting to collect any judgment he may have obtained against the railroad company in the Circuit

Court of Monroe County, Miss., which judgment was affirmed in the Supreme Court of Mississippi. Again on the 30th Sept., 1914, the temporary injunction was made perpetual. (See decree and writ in the record on the first appeal.) The court is now presented with the fact that the appellee has been perpetually enjoined from collecting his judgment obtained in the State courts of Mississippi. This, we submit, was error on the part of the district court, and the motion of appellee should have been sustained.

Section 720 of the Revised Statutes of the United States is:

> "That the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State; except in cases where such injunction may be authorized by any law relating to bankruptcy."

It may be argued in this court by appellant, as it was in the lower court, that this statute does not prohibit an injunction to stay the collection of a judgment, since the proceedings in the State court ended when the judgment was rendered. We submit that this argument is erroneous. It has been held in a number of cases in the circuit court of appeals and also in the Supreme Court of the United States that the jurisdiction of the State courts is not exhausted by the rendition of the judgment but continues until the judgment shall be satisfied. We refer the court to the following authorities in support of this statement, to wit:

Central Bank of Boston *vs.* Stephens, 169 U. S., page 432.

Wayman *vs.* Southard, 10th Wheat., page 1.

Leathe *vs.* Thomas, 97th Fed., page 136, 7th C. C. A.

We quote the following from the case of Leathe *vs.* Thomas, *supra*, as follows, to wit:

> "It is contended that the restraining order does not stay any proceedings in the State court and that its

only purpose is to control the action of a ministerial officer. It is conceded that no court of the United States can lawfully issue any order of injunction to arrest the progress of the suit pending in any court of a State, but it is claimed that this is not a suit pending in a court of a State, inasmuch as the matter has passed into a judgment, and that the issuance of the execution by the clerk and the act of the sheriff in executing it are to be performed under the mandate of the statute, and form no part of the proceeding of the court. This contention cannot be maintained. The prohibition of the statute does not extend to proceedings in a court of a State up to and including final judgment only, but to the entire proceedings, from the commencement of the suit until the execution issued on the judgment or decree is satisfied."

But counsel may argue, as they have heretofore, that section 720, R. S., applies only where the injunction is sought by parties or privies to the proceeding in the State court, and that the appellant in this cause was not a party or a privy to the case in the State court of Appellant *vs.* The R. R. Co., but this argument is also unsound. The prohibition of this section of the Revised Statutes is general and applies not only to parties and privies, but to all persons. (See Whitney *vs.* Wilder, 45th Fed., page 554.) This case is from the fifth circuit. (Also see Mills, sheriff, *et al, vs.* Provident Life Ins. Co., 100th Fed., page 334, from the 9th circuit.)

We quote from the last-cited case as follows, to wit:

"There is nothing in the language of section 720 of the Revised Statutes nor in the reason for the enactment limiting its provisions to parties and privies to the proceeding in the State court, but the prohibition is general and denies to every Federal

> court the right to stay by injunction, at the suit of any person, proceedings in any court of the State, with an exception within which the present case does not come."

This section applies to the Supreme Court as well as to the circuit court. See Slaughter House cases, 10th Wallace (U. S.), page 273.

This court will bear in mind that this case is an action for injunctive relief, not as an incident to an existing cause of action in equity, but as the primary object of the action. If the injunction perpetually restraining the appellee from collecting this judgment is denied the appellant, then the bill necessarilly fails. In other words, the gravamen of the bill is for injunctive relief and this is recognized by Judge Walker in deciding the case on the former appeal. Where a bill prays for injunctive relief or a stay proceedings against the proceedings in a State court and also other relief which would be useless without said injunction, the whole bill is without equity and under the old rule would have been dismissed on demurrer.

Maloney *vs.* Mass. Loan Ass'n, 53rd Fed., page 209.
Foster's Federal Practice, vol. 1, pages 694-695; 4th edition.
Sargent *vs.* Helton, 115th U. S., page 348.
Riggs *vs.* Johnson Co., 6th Wallace, page 166.

We believe that under these authorities this court ought to sustain our contention and the circuit court of appeals was correct in reversing the cause and ordering the bill dismissed, regardless of whether the appellee is protected under the Employers' Liability Act or not.

Not only was this motion well taken, as shown by the preceeding authorities, but we also contend that on account of the comity of courts this court will be compelled to affirm the circuit court of appeals, because to sustain the

action of the district court in granting the injunction would be an interference with the jurisdiction of the State courts first had and obtained in the case of the Appellee *vs.* The R. R. Co.

The appellee sued the railroad company and obtained a judgment against it, which judgment was affirmed by the Supreme Court of Mississippi. The very contract and messenger's agreement, which is the basis of appellee's suit in this court, was offered in evidence by the railroad company in the State court as a defense to appellant's case. The State court held that the contract and messenger's agreement, Exhibit "B," was no defense to the appellee's suit against the railroad company; that the messenger's agreement was void as against public policy. The appellee thus has a valid judgment in the case, in which the very basis of the appellant's suit was held worthless and void and non-enforceable.

How could the district court enjoin appellee from collecting his valid judgment against the railroad company? The State courts and the United States courts have concurrent jurisdiction of this class of cases and this particular case. The State court first obtained jurisdiction and rendered judgment. The comity existing between courts of concurrent jurisdiction should be sufficient to bar appellant of any right to injunctive relief and should compel this court to remand the cause and dismiss the bill. As was well said by the court in the case of Leathe *vs.* Thomas, 97th Fed., page 136:

> "This section above cited (referring to sec. 720 of the Revised Statutes) is not the only obstacle which prevents the sustaining of the order of injunction. The principle of comity which obtains between courts of concurrent jurisdiction forms a recognized part of their duty. It requires that a subject-matter drawn and remaining within the cognizance of a court of general jurisdiction shall not be drawn into con-

troversy or litigated in another court of concurrent jurisdiction. This principle prevails in all courts of concurrent jurisdiction deriving their powers from a common source. 'A departure from this rule would lead to the utmost confusion and to endless strife between courts deriving their power from the same source; but how much more disastrous would be the consequence of such a course in the conflict of jurisdiction between courts whose powers are derived from entirely different sources? Buck *vs.* Colbath, 3rd Wallace, 334-341.' It is firmly established that the application of this principle forbids the courts of the States from interfering, by injunction or otherwise, with the mesne or final process of the courts of the United States; and the same principle, in like manner, forbids the courts of the United States from interfering, by injunction or otherwise, with the mesne or final process of the courts of the States."

We also call the court's attention to the cases of:
Morgan *vs.* Sturges, 154th U. S., page 268.
Whitney *vs.* Wilder *et al.*, 54th Fed., page 554.

This last case *supra* was decided by the fifth circuit, and the judge delivering the opinion in that case said:

"It was said by this court, in the case of Railway Co. *vs.* Kuteman, 54th Fed. Rep., page 547, that there is not in our system anything so unseemly as rivalry and contention between the courts of the State and the courts of the United States. The framers of our statute laws, foreseeing the evils of such conflicting jurisdiction, have wisely prohibited in express terms the granting of injunctions to stay proceedings in any court of a State. (R. S., Sec. 720). This prohibition of the statute extends to all cases over

which the State courts first obtained jurisdiction, and applies not only to injunctions aimed at the State court itself, but also, to injunctions issued to parties before the court, its officers or litigants therein, Diggs *vs.* Wolcott, 4th Cranch, 179; Peck *vs.* Jenness, 7th Howard, 625; Dial *vs.* Reynolds, 96th U. S., page 340."

We also call the court's attention to the case of Mills *vs.* Provident Life & Trust Co., 100th Fed., 136; Nelson *vs.* Camp, 191st Fed., 712; 16th C. C. A., page 90.

3rd.

There are only two exceptions authorizing the United States courts to grant injunctions to prevent a party from collecting a judgment obtained in a State court; one is where the judgment has been obtained by fraud; the other is where the injunction is necessary for the exercise of the jurisdiction of the Federal court and agreeable to the usages and principles of law. The exception dealing with proceedings in bankruptcy is not discussed as not involved in this litigation.

Was there any fraud on the part of appellee in obtaining the judgment against the railroad company? But before we enter a discussion of the facts in answer to this question, we desire to call the court's attention to the fact that before the United States court will issue injunctions to stop the collection of judgments obtained in State courts, it must be established and shown that there was actual fraud in fact in obtaining the judgment. There must be fraud in fact, such as the suppression of certain material evidence or the use of false evidence, and there has never been an adjudicated case wherein it was held to be fraud for a party to sue and recover a judgment in a State court when the entire proceeding leading up and including the

judgment has been approved by the trial and the Supreme Court, and when as a matter of fact no wrong or fraud has been committed by the party suing, as in the instant case.

There can be no fraud where there is no wrong, and fraud cannot be deduced or inferred from that which the law pronounces legal and honest; nor can it be predicated upon acts which the party charged had a right by law to do, provided he pursues such right by lawful means. The record in this case shows there was no fraud in obtaining the judgment in the Supreme Court of the State of Mississippi, or in the trial court. The case was regularly and legally tried in the State courts, and under the State law the judgment obtaining in the trial court was affirmed on appeal by the Supreme Court of Mississippi.

See 58th Southern Reporter, page 485; St. L. & S. F. R. R. Co. *vs.* O. G. Taylor.

The judgment was regular in all respects, and under the law of the State of Mississippi, the contract, Exhibit "B," which is the basis of appellant's suit, was held to be void and not a bar to the appellee's right to recover damages for an injury done him by the railroad company. The contract was held void by the Mississippi Supreme Court and a judgment rendered for appellant, not because he had fraudulently violated the contract, Exhibit "B," not because of any fraud in obtaining the judgment, but primarily because the contract was void as against the public policy of the State of Mississippi. Refer to I. C. R. R. Co. *vs.* Harris, 108th Miss., page 574.

Appellee did not obtain the judgment by fraudulently violating the contract Exhibit "B," because the State courts held there was no contract, stating that the contract, Exhibit "B," was a contract contrary to public policy, and void.

We respectfully submit that rights and judgment of State courts should not be frittered away and set aside by a

Federal court, because the litigants in the State courts neglected and failed to assert their rights according to the State laws. The appellant had its day in court and it chose not to pursue its full and adequate remedy under the law. And now having lost, we submit that it ought not to be allowed, on the mere assertion of fraud, without an iota of proof of fraud in obtaining the judgment, invoke the aid of the U. S. courts by injunction to set aside and annul the solemn judgments of the courts of Mississippi.

Why did not the appellant, after having been denied its petition to remove the cause to the U. S. court, appeal to the Supreme Court of Mississippi and have the supreme court pass on this matter. And if in that court the petition had been denied, would it not have had the right to have had the decision of the Supreme Court of Mississippi reviewed by the Supreme Court of the United States? We answer that it would. The appellant had the right to have filed its bill in the chancery court of Mississippi, and enjoined the collection of the judgment obtained in the Supreme Court of Mississippi, and from an adverse ruling it could have had the question submitted by appeal to the Supreme Court of the United States. But appellant refused to pursue either of these remedies, and sought the direct aid of the United States court to enjoin the judgment of appellee, which was regular and fair and free from any and all fraud.

How could the appellee be guilty of fraud in fact or law in obtaining his judgment in the State courts when the State courts passed on this very contract, Exhibit "B," and held that it was void? According to the law of Mississippi, it would have been a fraud on the rights of the appellee to have held this contract, Exhibit "B," a valid, binding contract. And after this decision by the State courts, for the United States courts to hold that appellee obtained his judgment fraudulently would be in effect to say that the State courts were equally guilty with appellee in committing this

fraud. The State courts held that appellee was not guilty of fraud in obtaining this judgment, and we respectfully insist that the matter could not be reopened by the United States courts, as it would be a violation of the comity of courts, and in this case at bar, where the injunctive relief of the United States courts is asked, would be a violation of the Revised Statutes, as heretofore quoted.

It is true the decree of the district judge in this cause recites that the judgment was obtained by fraud, as violating the provisions of Exhibit "B," but this holding by the trial judge is clearly a misapprehension of the legal effects of appellee's action, and is not a finding of facts based on any proven facts. Appellee, in instituting his suit against the railroad company, in the State courts and in obtaining his judgments was simply exercising a legal right given him under the laws of Mississippi, and as a sequence, there could be no wrong in availing himself of his legal rights.

The district court did not decide that the injunction was maintainable for the purpose of upholding the jurisdiction of the Federal courts, but simply and alone for the reason that the court thought appellee had obtained his judgment in the State courts by violating his contract and therefore committing a fraud. So we do not consider that this exception to the application of section 720, Revised Statutes, is involved. But we say that since the bill is primarily for injunctive relief, which can not be upheld, then there was no equity in the bill, and therefore no jurisdiction to be maintained.

D.

The appellant voluntarily sought the jurisdiction of the State courts in the case of Appellee vs. The Railroad Co.. but did not exhaust its remedies by appeal, and is therefore estopped or has waived its right to maintain its present suit in the United States court.

The record in this cause further shows that the Circuit Court of Monroe County, Miss., first obtained and acquired jurisdiction of the litigation. That on the 14th March, 1910, the appellant filed a petition to be made a party defendant to the suit of Appellant *vs.* Railroad Co., alleging that it was the real party in interest, and asking that the cause be removed to the Federal court. On the hearing of this motion by the circuit court it was overruled and the petition disallowed, and from this decision of the said court of Monroe County, Miss., the appellant did not appeal to the Supreme Court of Mississippi, but abandoned further proceedings in the State court and then filed its present bill in the United States district court. See admission of counsel for appellee on page 71 of record, in paragraph 3 thereof.

We submit that this action on the part of the appellant constitutes a waiver of its rights or estops the appellant from then proceeding to institute the present suit in the United States courts. First, because the appellant should have exhausted all remedies given to a litigant in the State courts before it could ask redress in the Federal courts. And appellant was denied its motion by the circuit court of Monroe County, Miss.; it had the legal right to appeal from this decision to the State Supreme court and then if that court denied its appeal, to go by writ of error to the United States Supreme court. The Circuit court of Monroe County, Miss., acquired jurisdiction of the litigation by virtue of the

motion and petition of the appellant, and also by virtue of the motion of the railroad company to make the appellant a party, and having done so, had the right to hold its jurisdiction, to the exclusion of the Federal court, until its duty was fully performed and the jurisdiction involved was exhausted.

As was said by Justice Shiras in the case of Harkreader *vs.* Wadley, 172 U. S., page 148:

> "When a State court and a court of the United States may each take jurisdiction of a matter the tribunal where jurisdiction first attaches holds it to the exclusion of the other, until its duty is fully performed and its jurisdiction is exhausted."

See also Freeman *vs.* Howe, 24th Howard (U. S.), page 450; Buck *vs.* Colbath, 3rd Wallace, 334; Taylor *vs.* Taintor, 16th Wallace, 366.

The appellant in its motion of 14th March, 1910, to be made a party in the suit of Appellee *vs.* The Railroad Co. alleges in its petition that it desires to be made a party defendant in that suit for the purpose "to defend said suit, and that as the railroad company had refused to remove the said suit to the Federal court the petitioner, appellee, desired to remove the same." Again in this petition the appellant asserted that it was a defendant in the suit of Appellee *vs.* The Railroad Co., and that said cause at that time was pending undecided. Under the decisions of the State of Mississippi, when a party comes into court and into a litigated court, by motion for any purpose, and especially when asking to be made a party to the litigation, it is an appearance, and the State court acquires jurisdiction of the party so making the motion.

Thus by its motion the appellant, having voluntarily come into the Circuit Court of Monroe County, Miss., and it, through its astute counsel, alleging in its petition that

it was a defendant in the Circuit Court of Monroe County in the case of The Appellee *vs.* The Railroad Co., which as a matter of fact was true, then it follows, the appellant could not legally abandon the State courts without having exhausted the jurisdiction of the said courts by appeal, and if denied by that court what appellant thought were its rights, it could have settled its rights by appeal to the Supreme Court of the United States. We respectfully submit that the appellant could have sought the injunctive relief and could have obtained it in the proper State court, to wit, the Chancery Court of Monroe County, Miss., an injunction restraining the prosecution of the case of Appellee *vs.* The Railroad Co., and thus would have obviated the conflict of jurisdiction between the United States and the State courts, and would not now be seeking to violate the fundamental laws and statutes of Mississippi and the United States. And we respectfully submit that since the appellant sought the jurisdiction of the State courts, that this was the sole and only remedy left, first either to appeal to the Supreme court of Mississippi or to have filed its bill in the chancery court of Mississippi.

IV.

CONCLUSION.

We respectfully submit in conclusion that the circuit court of appeals was correct in reversing the cause and ordering the bill dismissed and the injunction dissolved, for the following reasons:

1st. The trial court erred in not sustaining the motion of appellee to dismiss the bills as amended, and dissolve the injunction, for the reason that the messenger's contract, Exhibit "B" to the amended bills, was void and unenforce-

able, as violating section 5 of the act of Congress, April 22nd, 1908, chapter 149, 35th Statutes at Large, page 65 and amendments; that this act applies to and protects employees of express companies injured while handling interstate commerce, when said express companies are engaged as common carriers of interstate commerce by railroad. And that the appellant and the railroad company, under its contract, Exhibit "A" to the bills, are partners or co-proprietors engaged as common carriers of interstate commerce by railroad, and appellee was a joint employee of both, and can therefore plead that the messenger's agreement, Exhibit "B," is void as violating the employers' liability act.

2nd. The trial court erred in overruling the appellee's motion to dismiss the cause, and erred in allowing the Wells Fargo & Co. to amend the bills, after the reversal and remanding of this cause and after the circuit court of appeals had declined to allow the appellant to amend the bills, since the decree in the circuit court of appeals was a final decree and Wells Fargo & Co. took no appeal from this decree nor did Wells Fargo & Co. appeal from the overruling of its motion by the circuit court of appeals.

3rd. The district court erred in not dismissing the amended bills and dissolving the injunction, because that court was without jurisdiction of the cause; since the amended bills prayed for an injunction as the primary object of the action, an injunction to restrain the appellee from collecting a judgment obtained in the supreme court of Mississippi, which relief as prayed for would in effect be contrary to the comity of courts existing between the United States and the State of Mississippi courts, and would be violative of section 720, R. S., and of section 265, chapter 11, of the judiciary act of March 3, 1911.

4th. The district court erred in not dismissing the amended bills and dissolving the injunction, because the

appellant voluntarily sought the jurisdiction of the Mississippi courts in the case of the Appellee *vs.* The R. R. Co., and then did not exhaust its remedies by appeal, and is therefore estopped or has waived its rights to file the suit in the United States district court.

Respectfully submitted,

PAINE & PAINE,
Solicitors for the Respondent.

Aberdeen, Miss.

THOMAS FITE PAINE,
Of Counsel.

WELLS FARGO AND COMPANY *v.* TAYLOR.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 41. Argued December 19, 1919.—Decided December 6, 1920.

1. Where the District Court sustains a bill in equity against a demurrer and upon final hearing renders a decree for the plaintiff, a reversal ordered by the Circuit Court of Appeals purely because of an amendable deficiency of the bill and unaccompanied by any direction that the bill be dismissed or implication forbidding its amendment, leaves the District Court free to permit the amendment; and the fact that the Circuit Court of Appeals, in denying a petition for rehearing, refused to direct the allowance of the amendment signifies merely that it saw no occasion to control the District Court's discretion in the matter. P. 181.
2. The provision of the Judicial Code (§ 265, formerly Rev. Stats., § 720) forbidding any court of the United States to grant an injunction to stay proceedings in any court of a State, is intended to give effect to the principle of comity and to prevent unseemly interference with the orderly disposal of litigation in the state courts, but not to hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and by the laws of Congress. P. 182.
3. The inhibition does not forbid the federal courts to enjoin a party from collecting a judgment obtained in a state court where its enforcement would be contrary to recognized principles of equity and the standards of good conscience. P. 183. See headnote 6, *infra*.
4. An arrangement between a railroad company and an express company whereby, in consideration of stipulated payments, the former grants to the latter the exclusive privilege of conducting the express business over its line, and transports, by cars provided by it and attached to its passenger trains, the express matter and accompanying messengers of the latter, besides furnishing room in its stations for the express company's use, and under which the latter assumes all risk of damage to its property and express matter so transported and of injury to its agents and employees while engaged in its business on the trains or property of the railroad company, and agrees to indemnify that company against claims for damages suffered by

such agents or employees while so engaged—does not create a partnership relation but constitutes the business of the express company distinct from that of the railroad company, so that an employee of the express company, while employed as its messenger on an express car in course of transportation, cannot be treated as an employee of the railroad company for the purpose of applying the Employers' Liability Act. P. 186.

5. The Employers' Liability Act, applicable to "every common carrier by railroad," does not embrace an express company conducting its business under such an arrangement with a railroad company. P. 187.

6. An express company operating over a railroad under an agreement by which it assumed all risk of injury to its employees while engaged in its business on the trains of the railroad company and agreed to indemnify that company against such claims, employed a messenger who, as a condition to his employment, assented to this understanding and agreed on his part to assume all risk of injury incident to his employment, from whatever cause arising. The employee was injured by the negligence of the railroad company while in discharge of his duties to the express company, and recovered judgment against the railroad company in an action in a state court in which the express company was not a party and could not be heard. He was financially irresponsible. *Held*, that his contract was valid and bound him to the express company not to assert such a liability against either company, and that the express company was equitably entitled to enforce the obligation by a suit against him in the District Court (diverse citizenship being present) in which collection of the judgment should be enjoined. P. 188.

249 Fed. Rep. 109, reversed.

THE case is stated in the opinion.

Mr. Charles W. Stockton, with whom *Mr. K. E. Stockton* and *Mr. Edward R. Whittingham* were on the brief, for petitioner.

Mr. Thomas Fite Paine for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

Oscar G. Taylor, an express messenger of Wells Fargo & Company, a common carrier by express, received sub-

stantial personal injuries through the derailment of an express car in which he was working, and which was part of a passenger train moving over the railroad of the St. Louis and San Francisco Railroad Company in the State of Mississippi,—the derailment resulting from negligence on the part of the railroad company and its employees. To recover for these injuries Taylor brought an action against the railroad company in the Circuit Court of Monroe County, Mississippi, and obtained a judgment for $4,000, which was affirmed by the Supreme Court of the State without an opinion. See 58 So. Rep. 485.

In his declaration in that case Taylor explained and justified his presence on the train and in the express car by alleging that he was then in the employ of the express company as its messenger and in the course of that employment was in charge of express matter which the railroad company was transporting for the express company, that this transportation was in pursuance of a contract between the two companies, and that under the contract the express car was furnished by the railroad company and he, as the express company's messenger, was permitted to accompany the express matter carried therein.

While the declaration said nothing more about the nature or terms of that contract, it is important here to have them in mind. The contract shows that it was intended to, and did, cover all express business on and over the railroad company's road, both within and without the State of Mississippi, for a specified period, including the day when Taylor was injured. It gave to the express company the exclusive privilege of conducting an express business on and over the railroad and obligated the railroad company to refrain from conducting an express business. There were provisions whereby the railroad company agreed, (a) to transport by suitable cars, to be provided by it and attached to its passenger trains, all express matter of the express company and the messengers accompanying the

same, (b) to light and warm the cars and equip them with necessary conveniences, and (c) to permit portions of its station houses to be used by the express company for the reception, safekeeping and delivery of express matter. And there were other provisions whereby the express company agreed, (a) to make stated payments—usually a percentage of the gross earnings—for the facilities furnished and service rendered by the railroad company, (b) to assume all risks, losses and damages to its own property, express matter and valuable packages transported under the contract, (c) to assume all risk and damage to its agents and employees while engaged in its business on the trains or property of the railroad company, and (d) to indemnify and hold harmless the railroad company in respect of all claims for damages suffered by such agents and employees while so engaged.

There was also a contract between Taylor and the express company, spoken of as a messenger's agreement, wherein,—following a recital that he had full knowledge of the service required and the conditions on which the railroad company would permit messengers to accompany express matter on its trains, and that with such knowledge he was desirous of becoming a messenger of the express company,—it was stipulated, as a term or condition of his employment, that neither the express company nor the railroad company should under any circumstances or in any case be liable for any injury which he might receive while on the railroad company's trains as such messenger, whether caused by negligence of the railroad company or otherwise, and that he would assume all and every risk incident to such employment, from whatever cause arising.

Promptly after Taylor sued the railroad company in the Circuit Court of Monroe County, and before the case was brought to trial, the express company presented to that court in that cause a petition wherein it set out the contracts just described and asked to be made a party defend-

ant. To this the railroad company assented, but Taylor evidently objected and the petition was denied. The railroad company by its answer and evidence sought to avail itself of the stipulation in the messenger's agreement, in connection with those in the other contract, but the court ruled against it and Taylor obtained the judgment before mentioned.

What has been recited will conduce to a right understanding of another suit the decree in which we are now to review.

The suit is in equity and was brought by the express company against Taylor in the District Court of the United States for the Northern District of Mississippi. The federal jurisdiction rests on diversity of citizenship,—the express company being a corporation and citizen of Colorado, and Taylor a citizen of Mississippi residing in the Northern District. The bill, with a supplement and amendment, proceeds on the theory that, in suing the railroad company and obtaining a judgment against it, which as between that company and the express company must be paid by the latter as stipulated in their contract, Taylor not only violated the messenger's agreement, but perpetrated a legal fraud on the express company; that the judgment is therefore one which in equity and good conscience he has no right to enforce; that if he be permitted to enforce it the express company will be without any effective remedy in that he has no property which can be reached by legal process (a fact which is both alleged and proved); and that the express company, which was not a party to that case, and has not been in any wise negligent or at fault, is in equity and good conscience entitled to have the messenger's agreement respected and to demand that the claims embraced in the inequitable judgment be relinquished and the enforcement of the judgment enjoined. The prayer conforms to that theory and is in substance that Taylor be required specifically to perform

and carry out the messenger's agreement, to execute a sufficient release of all claims on account of the injuries received, and to abstain from enforcing the judgment. General relief also is prayed.

Taylor challenged the bill by a demurrer, which was overruled, and after a hearing in due course the express company prevailed. On appeal to the Circuit Court of Appeals that decree was reversed and the suit remanded because in that court's opinion the bill did not show that Taylor was not in the employ of the railroad company or that he was solely in the employ of the express company. 220 Fed. Rep. 796. After the mandate was received, Taylor, conceiving that the decision of the Circuit Court of Appeals fully disposed of the merits and was final, requested the District Court to enter a decree dismissing the bill, and the express company requested leave to amend the bill by correcting the defect pointed out by the Circuit Court of Appeals. Taylor's request was denied and that of the express company was granted. The bill was accordingly amended so as to show that Taylor was not in the employ of the railroad company, but was on the train solely in virtue of his employment by the express company, and that in his declaration in the action against the railroad company he did not claim or allege any employment by that company, but, on the contrary, claimed and alleged that it permitted him to be on the train because he was accompanying the express matter as the express company's employee. Taylor then filed a new answer, and on a further hearing a decree for the express company was entered. By it the District Court found that the allegations of the bill, with its supplement and amendment, were all true; declared that the institution of the action against the railroad company and its prosecution to judgment constituted a violation of the messenger's agreement and a legal fraud on the express company; directed Taylor to carry out and perform the messenger's

agreement and to execute, within a fixed time, an appropriate instrument releasing the express company and the railroad company from all claims for damages on account of his injuries, and enjoined him from collecting or attempting to collect the judgment against the railroad company. On a further appeal to the Circuit Court of Appeals that decree was reversed with directions to dismiss the bill. 249 Fed. Rep. 109. A writ of certiorari was then granted by this court.

On the second appeal the Circuit Court of Appeals put its decision entirely on the ground that the express company was a "common carrier by railroad" within the meaning of the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and therefore under § 5 of the act the messenger's agreement was void. Taylor advanced that and other grounds in asking a reversal, but the court did not discuss the other grounds. All are pressed on our attention, and we take them up in what seems the natural order.

1. It is urged that the decision of the Circuit Court of Appeals on the first appeal was final in that it disposed of all questions in the suit and left nothing open to the District Court but to dismiss the bill. Had this been so, the Circuit Court of Appeals on the second appeal hardly would have failed to enforce its prior decision. But that decision did not go as far as is claimed. It turned on the sufficiency of the bill, and on that alone. The District Court had held the bill sufficient when challenged by a demurrer. The Circuit Court of Appeals held it insufficient, and for that reason reversed the decree and remanded the suit. Had the District Court taken that view when acting on the demurrer, it undoubtedly could, and probably would, have allowed an amendment curing the defect. Could it not equally allow the amendment after the Circuit Court of Appeals pointed out the defect and remanded the suit? It, of course, was bound to give effect to the decision and

mandate of the Circuit Court of Appeals; but that court did not order the bill dismissed nor give any direction even impliedly making against the amendment. All that was disposed of was the matter of the sufficiency of the bill. And recognition of this is found in the last opinion of the Circuit Court of Appeals, where it is said that the first reversal was "based upon the insufficiency of the pleadings." We think the decision on the first appeal was not final and that the District Court was left free, in the exercise of its discretion, to permit the amendment. Equity Rules, Nos. 19 and 28; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 258–259; *Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551, 553; *Smith* v. *Adams*, 130 U. S. 167, 177. It appears that in denying a petition for a rehearing on the first appeal the Circuit Court of Appeals refused to direct the allowance of the amendment; but this signifies nothing more than that no occasion was perceived for controlling the District Court's discretion in the matter.

2. Section 265, Judicial Code, formerly § 720, Rev. Stats., provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy"; and this is relied on as showing that the District Court could not entertain the suit. That court held the provision not applicable, and the Circuit Court of Appeals said nothing on the subject on either appeal, possibly because in a similar case it had held the provision without application.

Is the suit one to stay proceedings in a state court in the sense of that provision? If it is, the District Court erred in not dismissing the bill on that ground. *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 U. S. 340; *United States* v. *Parkhurst-Davis Co.*, 176 U. S. 317. If it is not, the court rightly entertained the suit and proceeded to an adjudication of the merits, for the citizenship of the

parties and the amount in controversy were within the jurisdictional requirements.

The provision has been in force more than a century and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States, *Ex parte Young*, 209 U. S. 123; *Truax* v. *Raich*, 239 U. S. 33; *Missouri* v. *Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533, 538, 543; or prevent them from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in the state courts, *French* v. *Hay*, 22 Wall. 250; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207, 219; *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, 221; or prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience, *Marshall* v. *Holmes*, 141 U. S. 589; *Ex parte Simon*, 208 U. S. 144;

Simon v. *Southern Ry. Co.*, 236 U. S. 115; *Public Service Co.* v. *Corboy*, 250 U. S. 153, 160; *National Surety Co.* v. *State Bank of Humboldt*, 120 Fed. Rep. 593.

Marshall v. *Holmes*, just cited, was a suit in equity to enjoin one who had obtained judgments in a state court from enforcing them, that relief being sought on the ground that they were secured by fraud which was not discovered until after they were rendered; and the question distinctly presented was whether the suit was one which the Circuit Court of the United States could entertain and decide, the requisite diversity of citizenship and amount in dispute being present. This court,—after adverting to prior decisions stating the familiar doctrine that "any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery," and also showing that such a suit is not one to review or revise the action of the court rendering the judgment, but is a new and independent suit for equitable relief,—answered the question by saying: "These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a

state court. It would simply take from him the benefit of judgments obtained by fraud."

Simon v. *Southern Ry. Co.*, *supra*, was a suit in a Circuit Court of the United States to enjoin the enforcement of a judgment in a state court on the ground that it was obtained by fraud and without notice, and the defendant invoked the provision in § 265. The Circuit Court took jurisdiction and awarded the relief sought. That decision was affirmed by the Circuit Court of Appeals and on a further appeal was sustained by this court. At that time this court considered the provision in the light of its origin and purpose, reviewed the prior decisions and in an extended opinion having the approval of the entire court reaffirmed the ruling in *Marshall* v. *Holmes*.

National Surety Co. v. *State Bank of Humboldt*, *supra*, was a suit in a federal court to obtain like relief in respect of a judgment in a state court on the ground that through a mistake of a public officer, for which he alone was responsible, the judgment had been rendered without opportunity for putting in a defense, and this when there was one which was both meritorious and complete. The suit was not brought by the judgment defendant, but by one who was obligated to pay the judgment if it was enforced. The bill was dismissed because of the provision now relied on; but that decision was reversed by the Circuit Court of Appeals in a well considered opinion wherein it was said that in cases otherwise within the jurisdictional statute "the Circuit Courts of the United States have the same jurisdiction and power to enjoin a judgment plaintiff from enforcing an unconscionable judgment of a state court, which has been procured by fraud, accident, or mistake, that they have to restrain him from collecting a like judgment of a federal court"; that the bill presented a new and justiciable case which had not been presented to nor decided by the state court and did not "fall under the ban of the section of the statute under consideration"; and

that "In this case all these facts concur—the judgment which it is against conscience to allow to be used to extort money that is not owing from a defendant remediless at law, the complete meritorious defense to the claim on which this judgment is based, the fact that the defendant in the judgment was prevented from availing itself of its defense to the cause of action by an unavoidable accident, and the absence of any negligence of the defendant or of its agents. These facts appeal with compelling force to the conscience of a chancellor. They have been presented to a court to which the Constitution and the acts of Congress have granted the power, and upon which they have imposed the duty, to grant the relief to which the complainants are equitably entitled; and the decree which dismissed their bill must be reversed."

Without pursuing the subject further, we hold that the present suit is not one to stay proceedings in a state court in the sense of § 265.

3. Does the Employers' Liability Act affect the validity of the messenger's agreement?

The act provides that "every common carrier by railroad" shall be liable in damages for the injury or death of any of its employees occurring while it is engaged and he is employed in interstate commerce and resulting in whole or in part from the negligence of any of its officers, agents or employees, or from any defect or insufficiency, due to its negligence, "in its cars, engines, appliances, machinery, track, roadbed," etc.; and in § 5 it declares that any contract whereby a common carrier exempts itself from "any liability created by this Act" shall to that extent be void.

In his declaration in the state court Taylor did not claim that he was in the employ of the railroad company, and his judgment was not obtained on that theory. Here it is shown with certainty that he was not in that company's employ. True he urges that the contract between the two

companies shows a co-proprietorship or sort of partnership between them which made him an employee of both; but the contract discloses no basis for the claim or for distinguishing his case from that of the Pullman porter recently before us. *Robinson* v. *Baltimore & Ohio R. R. Co.*, 237 U. S. 84. Here the businesses of the companies concerned were quite as distinct in point of control and otherwise as they were there. That here the railroad company provided the express car is not material, for it is measurably equalized by other differences. In both cases the railroad company provided the motive power and the train operatives. The messenger here, like the porter there, was on the train as an employee, not of the railroad company, but of another by whom he was employed, directed and paid, and at whose will he was to continue in service or be discharged.

As respects the express company, it appears not merely that Taylor was in its employ, but also that the injuries were received while it was engaged and he was employed in interstate commerce; and so the question is presented whether the act embraces a common carrier by express which neither owns nor operates a railroad, but uses and pays for railroad transportation in the manner before shown. The District Court answered the question in the negative and the Circuit Court of Appeals in the affirmative. A negative answer also has been given in a like situation by the Court of Errors and Appeals of New Jersey, *Higgins* v. *Erie R. R. Co.*, 89 N. J. L. 629; and a recent decision by the Supreme Court of Minnesota makes persuasively for that view. *State ex rel. Great Northern Express Co.* v. *District Court*, 142 Minnesota, 410.

In our opinion the words "common carrier by railroad," as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words,

but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad (see *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 212–213); by the obvious reference in the latter part of §§ 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employees (see *San Antonio & Aransas Pass Ry. Co.* v. *Wagner*, 241 U. S. 476, 484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown. 1 I. C. C. 349; *United States* v. *Morsman*, 42 Fed. Rep. 448; *Southern Indiana Express Co.* v. *United States Express Co.*, 88 Fed. Rep. 659, 662; s. c. 92 Fed. Rep. 1022. And see *American Express Co.* v. *United States*, 212 U. S. 522, 531, 534.

As Taylor was not an employee of the railroad company and the express company was not within the Employers' Liability Act, it follows that the act has no bearing on the liability of either company or on the validity of the messenger's agreement.

4. There being no statute regulating the subject, it is settled by the decisions of this court, and is recognized in other jurisdictions, that the messenger's agreement was a valid and binding contract whereby Taylor agreed to assume all risk of injury incident to his employment, from whatever cause arising, assented to the contractual arrangement between the two companies in respect of such injuries, and became obligated to the express company to refrain from asserting any liability against it or the railroad company on account of any such injuries. *Express Cases*, 117 U. S. 1; *Baltimore & Ohio Southwestern Ry. Co.* v. *Voigt*, 176 U. S. 498, and cases cited; *Santa Fe*,

Prescott & Phœnix Ry. Co. v. *Grant Brothers Construction Co.*, 228 U. S. 177; *Robinson* v. *Baltimore & Ohio R. R. Co.*, *supra*; *Perry* v. *Philadelphia, Baltimore & Washington R. R. Co.*, 24 Delaware, 399; *McKay* v. *Louisville & Nashville R. R. Co.* (Tenn.), 182 S. W. Rep. 874; *Fowler* v. *Pennsylvania R. R. Co.*, 229 Fed. Rep. 373. In violation of that agreement he wrongfully sought and obtained a judgment against the railroad company, which as between the two companies the express company is bound to pay. The judgment was obtained in an action to which that company was not a party and wherein it could not be heard. He is financially irresponsible and if the judgment is collected the express company, which has not been in any wise negligent or at fault, will be remediless. In these circumstances, that company is entitled in equity and good conscience, as is shown by the cases before cited, to a decree holding him to his agreement and depriving him of his present inequitable advantage, and to that end enjoining him from collecting the judgment.

It follows that the decree of the District Court was right and that the Circuit Court of Appeals erred in reversing it.

Decree reversed.